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IN THE

The Supreme Court of the United States

October Term 1993

HARRY K. SINGLETARY, Jr.,

Petitioner,

v.

LLOYD DUEST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS WHICH FOUND HARMFUL ERROR BASED ON A VIOLATION OF *JOHNSON v. MISSISSIPPI*, 486 U.S. 578 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENT IN *BRECHT V. ABRAHAMSON*, 507 U.S. ___, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit from which this appeal is taken is reported at *Duest v. Singletary,* 997 F.2d 1336 (11th Cir. 1993), and is reproduced in the appendix to this pleading. The order denying rehearing was rendered on September 30, 1993, and is also reproduced in the appendix to this pleading. [A 1-10].

The decision of the United States Supreme Court previously granting the state's petition for writ of certiorari and remanding the case to the Eleventh Circuit is reported at

Singletary v. Duest, 507 U.S. ___, 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993), and is reproduced in the appendix to this pleading. [A-11].

The original decision of the United States Court of Appeals for the Eleventh Circuit is reported at *Duest v. Singletary,* 967 F.2d 472 (11th Cir. 1992), and is reproduced in the appendix to this pleading. [A-12 - A-42].

The decision of the United States District Court for the Southern District of Florida, issued September 14, 1990 is unreported. The decision is reproduced in the appendix to this pleading. [A-43 - A-89].

The decision of the Florida Supreme Court denying Duest's *Johnson v. Mississippi* claim is reported at 555 So.2d 849 (Fla. 1990), and is also set forth in the appendix to this pleading [A-90 - A-100].

The decision of the Florida Supreme Court regarding Duest's direct appeal is reported at *Duest v. State,* 462 So.2d 446 (Fla. 1985), and is reproduced in the appendix to this pleading. [A-101 - A-109].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on July 29, 1993. A petition for rehearing and suggestion for rehearing en banc was filed and subsequently denied on September 30, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

Lloyd Duest was indicted for the first degree murder of John Pope in Ft. Lauderdale, Florida. The record reflects that Duest came to Florida by bus from Massachusetts the weekend of February 12, 1982. Upon his arrival, he told a witness that he was going to go to a gay bar to "roll a fag." During the weekend, Duest was seen leaving a gay bar with the victim, John Pope. Later that day, Duest was seen alone

driving the victim's car. Blood stains were seen on Duest's clothes, the victim's jewelry was found in the car driven by Duest, and Duest was in possession of a seven-inch knife during that time. Later that evening, Pope's roommate discovered the victim's nude body on the bathroom floor. He had been stabbed repeatedly. The struggle had started in the victim's bed and ultimately ended in the bathroom. At trial, Duest presented an alibi defense through several witnesses who claimed that he was in Massachusetts at the time of the murder. The jury returned a verdict of guilty to first-degree murder.

At sentencing, the State presented evidence of two prior violent felony convictions from Massachusetts as an aggravating circumstance. Duest presented testimony of various family members. The trial court found five aggravating factors to be supported by the evidence: 1) the defendant had been previously convicted of a prior violent felony, 2) the capital felony was committed while the defendant was engaged in the commission of a robbery, 3) the capital felony was committed for pecuniary gain, 4) the capital felony was especially heinous, atrocious, or cruel, and 5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Fla. Stat.* § 921.141(5)(b),(d),(f),(h), & (i) (1981). The trial court considered the aggravating circumstances 2 and 3 as a single factor because of the overlapping facts. The trial court found that no mitigating evidence applied to the case and imposed a sentence of death. The Florida Supreme Court affirmed the conviction and sentence of death. *Duest v. State,* 462 So.2d 446 (Fla. 1985).

Subsequently, the Massachusetts Court of Appeals vacated one of the prior convictions upon which the State relied to prove the "prior violent felony" aggravating factor. *Commonwealth v. Duest,* 524 N.E.2d 1368 (Mass. App. 1988). Duest then sought post-conviction relief in the state

trial court, claiming, among other things, that the jury's consideration of Duest's vacated prior conviction was improper under *Johnson v. Mississippi,* 486 U.S. 578 (1988). While the post-conviction motion was pending, the Governor signed a death warrant. After an evidentiary hearing, the trial court denied relief. The Florida Supreme Court refused to grant a stay of execution, denied Duest's petition for writ of habeas corpus, and affirmed the trial court's denial of relief. Regarding the jury's consideration of the vacated prior conviction, the supreme court found such error harmless because "evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there is still a basis for the aggravating circumstance of prior conviction of a violent felony." *Duest v. Dugger,* 555 So.2d 849, 851 (Fla. 1990).

Duest then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Florida, again alleging, among other things, that he was entitled to a new sentencing hearing under *Johnson v. Mississippi* because of the jury's consideration of his vacated prior conviction. Judge Ryskamp granted a stay of execution. Following the filing of further pleadings and oral argument, the district court denied all relief on September 14, 1990. Judge Ryskamp determined that any error under *Johnson v. Mississippi* was harmless beyond a reasonable doubt.

On appeal to the Eleventh Circuit Court of Appeals, a panel of the Eleventh Circuit reversed the district court's finding of harmless error regarding Duest's *Johnson* claim on July 15, 1992. Rehearing and rehearing en banc was subsequently denied on October 7, 1992.

The state petitioned this Court for a writ of certiorari, which this Court granted on April 26, 1993. *Singletary v. Duest,* 507 U.S. ___, 113 S. Ct. 1940, 123 L.Ed.2d 647 (1993). In so doing, this Court remanded the case for further

consideration in light of this Court's recent decision in *Brecht v. Abrahamson,* 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). On remand, on July 29, 1993, the Eleventh Circuit again found the jury's consideration of Duest's vacated prior conviction harmful error, even under the less-stringent standard enunciated in *Brecht.* On September 30, 1993, the Eleventh Circuit likewise denied the state's petition for rehearing and suggestion for rehearing en banc. This petition follows.

REASONS FOR GRANTING THE WRIT

THE PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS WHICH FOUND HARMFUL ERROR BASED ON A VIOLATION OF *JOHNSON v. MISSISSIPPI,* 486 U.S. 578 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENT IN *BRECHT V. ABRAHAMSON,* 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

After Duest was found guilty by a jury of the first-degree murder of John Pope, a separate sentencing hearing commenced. At this sentencing hearing, the state offered certified copies of conviction from Massachusetts relating to Duest which showed convictions in 1970 for armed robbery and armed assault with intent to murder. The trial court instructed the jury that both of Duest's prior convictions were sufficient to establish the "prior violent felony" aggravating factor. No reference to either of these convictions was made by the state during the sentencing hearing. During its deliberations, however, the jury requested to see *both* of the prior convictions. Sometime later, a majority of the jury (seven members) recommended a sentence of death.

As was required under Florida law, *see Fla. Stat.* § 921.141(3) (1981), the trial court conducted an independent review of

the aggravating and mitigating factors and determined that death was the appropriate sentence. In so determining, it found the existence of five aggravating factors (two of which were treated singularly because they were based on the same facts) and nothing in mitigation. Duest's conviction and sentence were affirmed on direct appeal to the Florida Supreme Court. *Duest v. State,* 462 So.2d 446 (Fla. 1985).

After his direct appeal, *one* of Duest's prior convictions—armed assault with intent to murder—was vacated on a technicality. In reversing the conviction, the Massachusetts appellate court noted that:

> The Commonwealth acknowledges that it cannot meet its burden of establishing the circumstances of the plea to the indictment charging armed assault with intent to murder. Note 1, *supra.* There is no proof that the defendant harbored a specific intent to murder or kill when shots from a pistol were fired out the window of the getaway vehicle at the police cruiser chasing that vehicle. The only evidence on that point is to the effect that the shots were fired at the pursuing police officers in the cruiser. The record, therefore, is fatally deficient on the essential mental element of armed assault with intent to murder, as that element has been clarified by *Commonwealth v. Henson,* 394 Mass. 584 (1985).

Commonwealth v. Duest, 26 Mass. App. Ct. 137, 138-139, n.2, 524 N.E.2d 1368 (1988).

In a petition for writ of habeas corpus filed in the United States District Court for the Southern District of Florida, Duest claimed that the jury's consideration of the vacated prior conviction constituted harmful Eighth Amendment error under *Johnson v. Mississippi,* 486 U.S. 578 (1988). Though finding Eighth Amendment error, the district court

found the error harmless under the standard enunciated in *Chapman v. California,* 386 U.S. 18 (1967), which was the preeminent harmless-error standard at the time.

On appeal to the Eleventh Circuit Court of Appeals, a panel of that court applied the *Chapman* standard and found the *Johnson* error harmful. In so finding, the Eleventh Circuit focused upon the facts that (1) the jury requested to see "the vacated convictions" during its deliberations, but requested no information or instruction on any other matter, (2) the jury recommended a sentence of death "by the narrowest of margins," i.e., seven to five, and (3) the jury was allowed to consider evidence that was "materially inaccurate," i.e., that Duest had been convicted of a violent crime wherein the underlying conduct reflected a murderous intent. *Duest,* 967 F.2d at 480-482.

After the Eleventh Circuit rendered its opinion, this Court issued its opinion in *Brecht v. Abrahamson,* 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), wherein this Court determined that a less-stringent harmless error analysis should be applied to cases on collateral review. As a result, this Court granted the state's petition for writ of certiorari, vacated the Eleventh Circuit's opinion, and remanded the case for further consideration in light of *Brecht.*

On remand, the Eleventh Circuit once again found the *Johnson* error harmful and vacated Duest's death sentence. In so doing, however, the Eleventh Circuit misapprehended the facts of this case and misapplied the *Brecht* standard. Review by this Court is therefore necessary.

Although the Eleventh Circuit acknowledged the *Brecht* standard and its progenitors, it applied the standard incorrectly. The Eleventh Circuit focused exclusively on the jury's recommendation of death "by the slim margin of 7-5" and rephrased the standard as follows: "[H]abeas relief is warranted if we believe even one of the jurors who voted in favor

of the death penalty likely was substantially influenced by the evidence of Duest's prior conviction." *Id.* This is clearly not the standard enunciated in *Brecht.*

This Court has previously held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan v. Pennsylvania,* 477 U.S. 79, 93 (1986). *See also Hildwin v. Florida,* 490 U.S. 638 (1989); *Spaziano v. Florida,* 468 U.S. 447 (1984). Thus, *a fortiori,* the number of jurors who vote for death has no constitutional significance. Simply because seven jurors voted for death as opposed to a greater number should not invite a presumption that the jury placed more weight on the invalid prior conviction than on the remaining valid prior conviction.

Moreover, the Eleventh Circuit's rewritten standard totally ignores the significance of the trial court's independent review of the evidence. In Florida, the trial court is required to independently review the evidence submitted and determine the appropriate sentence. *Fla. Stat.* § 921.141(3) (1981). Although it is required to give the jury's recommendation great weight, it may assign its own weight to the aggravating and mitigating evidence. In other words, the trial court makes the ultimate determination. By focusing on the jury's vote, however, and by deciding that "at least one juror who recommended the death penalty likely was substantially influenced by the vacated conviction," 997 F.2d at 1339-40, the Eleventh Circuit has unjustifiably ignored the trial court's analysis and conclusion in this case. In effect, the Eleventh Circuit has created a nexus between the jury's recommendation and the validity of the trial court's sentencing determination. In other words, the closer the jury's vote for death, the less valid the judge's written factual findings in support of a death sentence become.

Even if the Eleventh Circuit's focus on the jury's recommendation was proper, however, its application of the harmless error standard was not. First, its conclusion that a trial court's sentence of death over a jury's recommendation of life imprisonment would not have been proper, given the existence of "plenty" of nonstatutory mitigating evidence, is wholly inappropriate. That determination was made without the benefit of any state court's interpretation of state law as it applies in the instant case. *See Francis v. Dugger,* 908 F.2d 595, 704 (11th Cir. 1990).

Second, the Eleventh Circuit's conclusion that the jury was allowed to consider evidence that was "materially inaccurate," as opposed to evidence that was properly admitted but considered in an improper way, was equally faulty. In its original opinion, the court acknowledged that Duest may have committed some of the underlying conduct for the charged offense of armed assault with intent to murder, which was later vacated. *Duest v. Singletary,* 967 F.2d 472, 482 (11th Cir. 1992). The fact that the state could not prove Duest's intent to commit murder did not render the armed assault nonexistent. *See: Sochor v. Florida,* 505 U.S. ___, 112 S.Ct. 2114, 2122-2123, 119 L.Ed.2d 326 (1992); *Griffin v. United States,* 502 U.S. ___, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

Third, the Eleventh Circuit's reliance on the fact that the jury requested to see "the vacated convictions" during its deliberations does not establish that the jury placed more weight on the vacated conviction for this aggravating factor than the other prior violent conviction which was also shown and presented to the jury. The jury requested to see *both* of the convictions, not just the one that was later vacated. In fact, only one prior violent felony conviction is required pursuant to *Fla. Stat.* § 921.141(5)(b), which states: "The defendant was previously convicted of another capital felony *or a felony* involving the use or threat of violence to the person."

Any prediction as to the weight given to either one or both of these prior convictions is pure speculation. Speculation of that sort has no place in harmless error analysis and certainly does not satisfy Duest's burden of showing actual prejudice.

In all material respects, no *Johnson* violation occurred because the aggravating factor, § 921.141(5)(b), *Fla. Stat.*, was proven beyond a doubt, a prior violent felony was proven to the jury. Like *Sochor, supra,* and *Griffin, supra,* the "deficiency" was based on "insufficient evidence" regarding cumulative other prior convictions only. Certainly, the Eleventh Circuit's analysis that Duest met his burden to show prejudice cannot be sustained, where, as here, one of two prior violent felonies went unassailed and was proven beyond a reasonable doubt.

Although the Eleventh Circuit acknowledged that its task was to examine the entire record and determine whether the *Johnson* error was harmless in the full context of Duest's trial and sentencing hearing, it is evident from the opinion that it failed to complete its task. Only passing reference was made to the quantity and quality of aggravating evidence presented, and even then it was factually inaccurate. The court "recognize[d] that the state established three valid aggravating circumstances." 997 F.2d at 1339. In reality, the state established five aggravating factors (though two were merged); thus, inherent in the court's opinion is its complete rejection of the "prior violent felony" aggravating factor. Because only one of the two prior convictions was vacated, however, this aggravating factor remains valid. The unchallenged armed robbery conviction establishes this aggravating factor beyond a reasonable doubt. Thus, there are *four,* not three, valid aggravating factors.

The Eleventh Circuit also gave no weight to the fact that the state did not mention the underlying felonies when

arguing the existence of the "prior violent felony" aggravating factor to the jury. Nor did the court give any weight to the fact that the jury was instructed that both of the prior convictions viewed separately were sufficient to establish the "prior violent felony" aggravating factor. Rather, as discussed above, the circuit court focused on the jury's request to see *both* of the convictions during its deliberations. Its conclusions regarding this fact is, as noted, sheer speculation.

Finally, the Eleventh Circuit inaccurately relies upon an alleged "concession" by the state that " 'plenty' of nonstatutory mitigating evidence was present in this case." 997 F.2d at 1339. At a state evidentiary hearing involving a claim under *Hitchcock v. Dugger,* 481 U.S. 393 (1987), the state argued that Duest *presented* "plenty of nonstatutory mitigating evidence." Its argument, however, did not validate the quality or credibility of the evidence presented. In fact, the state has always maintained that the evidence presented as nonstatutory mitigating evidence was not sufficient to outweigh the aggravating circumstances in this case.

Even though the jury and the trial court considered a vacated prior conviction in determining its recommendation and sentence, a separate unchallenged prior conviction established the "prior violent felony" aggravating factor beyond a reasonable doubt. Moreover, reliance by the state upon the vacated conviction was minimal. In the final analysis, there were four valid aggravating factors, no statutory mitigating factors, and little in the way of meaningful nonstatutory mitigating evidence. In light of the record as a whole, Duest failed to prove below that the jury's and the trial court's consideration of the vacated prior conviction "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 123 L.Ed.2d at 373. In other words, Duest failed to prove that he suffered actual prejudice from the error. Given the Eleventh Circuit's

misapprehension of the facts and its misapplication of the harmless error analysis enunciated in *Brecht,* review by this Court is necessary.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the petition for writ of certiorari be granted and a summary reversal entered based on *Brecht, supra.*

Respectfully submitted,

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APPENDIX

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LLOYD DUEST, Petitioner-Appellant,

vs.

HARRY K. SINGLETARY, Jr., Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 90-6009.

United States Court of Appeals,
Eleventh Circuit.

July 29, 1993

Rehearing and Suggestion for Rehearing En Banc Denied Sept. 30, 1993.

Petitioner sought habeas relief from a first-degree murder conviction and death sentence. The United States District Court for the Southern District of Florida, No. 90-6045-CIV, Kenneth L. Ryskamp, J., denied petition, and petitioner appealed. The Court of Appeals, 967 F.2d 472, affirmed in part, and reversed in part, vacated in part, and remanded. Certiorari was granted. The Supreme Court, 113 S.Ct. 1940, vacated judgment and remanded. The Court of Appeals held that admission of subsequently overturned prior convictions was not harmless error and warranted habeas relief due to likelihood that at least one juror who had recommended death penalty had been substantially influenced by error.

Reversed in part, vacated in part, and remanded. Cox, Circuit Judge, specially concurred.

1. Habeas Corpus * 447, 482.1, 490(3), 496

"Structural defect" compromises entire trial process by depriving constitutional protections so basic that their absence renders trial unreliable and punishment fundamentally unfair and, thus, "structural defect" is not susceptible to harmless error analysis that applies to "trial error" such as admission of involuntary confession or improper use of defendant's post-Miranda silence; typical "structural defect" is total deprivation of right to counsel or exclusion of members of defendant's race from grand jury.

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus * 490(6)

Jury recommendation of death sentence based on subsequently vacated conviction was "trial error" rather than "structural defect," which allowed determination of whether error was harmless or merited habeas relief; error occurred during presentation of evidence, error's impact was capable of quantitative assessment in relation to all evidence at trial, and error did not infect entire trial process. U.S.C.A. Const.Amends. 8,14.

3. Habeas Corpus * 447

Petitioner is substantially prejudiced and entitled to habeas relief if constitutional error at trial substantially influenced verdict, or at least if grave doubt existed on whether error influenced verdict, although petitioner need not prove that jury would have rendered verdict in favor of petitioner but for error, and it is irrelevant whether reviewing court is persuaded that petitioner is guilty.

4. Habeas Corpus * 842

Harmless error was mixed question of law and fact subject to de novo review by Court of Appeals and, thus, Court of Appeals was not bound by Florida Supreme Court's determination on state postconviction review that petitioner's claimed error was harmless.

5. Criminal Law * 1208.1(6)

Under Florida law, jury's split vote of six to six is deemed recommendation against death penalty.

6. Criminal Law * 992, 1208.1(6)

Under Florida law, sentencing judge may override jury's recommendation of life imprisonment, and impose death penalty, only if no person reasonably could have concluded that life imprisonment is appropriate punishment for defendant.

7. Habeas Corpus * 490(6)

Admission of subsequently overturned prior conviction for armed assault with intent to murder was not harmless error and warranted habeas relief, in light of likelihood that at least one juror who had recommended death penalty had been substantially influenced by error; changed vote of one juror would have resulted in recommendation against death penalty under Florida law. U.S.C.A. Const.Amends. 8, 14.

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Celia A. Terenzio, Asst. Atty. Gen., West Palm Beach, FL, for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before TJOFLAT, Chief Judge, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

Appellant Lloyd Duest is an inmate on Florida's death row. Previously, we affirmed the district court's denial of habeas corpus relief as to Duest's conviction for first-degree murder, but reversed the court's denial of relief as to his sentence of death. *Duest v . Singletary,* 967 F.2d 472, 483 (11th Cir. 1992). We set aside Duest's capital sentence because his jury had based its recommendation of death upon consideration of a prior criminal conviction which later was vacated. *Id.* at 480. Imposition of the death penalty under such circumstances violates the Eighth and Fourteenth Amendments to the United States Constitution, as interpreted in *Johnson v. Mississippi,* 489 U.S. 578, 108 S.Ct. 1981, 100 L.Ed. 2d 575 (1988)[1] Furthermore, the State did not show beyond a reasonable doubt that Duest would have received the death penalty absent the *Johnson* error. *Duest,* 967 F.2d at 482. As such, we held the violation was not constitutionally excusable under the venerable harmless-error standard of *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828 17 L.Ed. 2d 705 (1967) (holding that conviction or sentence obtained in violation of the Constitution

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1 *Johnson* holds that a sentencing jury's consideration of a vacated conviction as the sole evidence of prior criminal conduct to establish an aggravating circumstance unconstitutionally undermines the "need for reliability in the determination that death is the appropriate punishment" 486 U.S. at 584, 108 S.Ct. at 1986. The State does not dispute that *Johnson* error occurred in this case.

must be vacated unless error was "harmless beyond a reasonable doubt").

Subsequently, the Supreme Court of the United States granted certiorari, vacated our judgment, and remanded the case to us for further consideration in light of the Court's recent decision in *Brecht v. Abrahamson,* 507 U.S.___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Singletary v. Duest,* 507 U.S. ___ 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993). *Brecht,* decided after our opinion vacating Duest's death sentence, partially supplants *Chapman.* It sets forth a relaxed harmless error test when federal courts find constitutional trial error on collateral review of state convictions and sentences.

After review in accordance with the Supreme Court's mandate, we now reinstate our earlier opinion, except for Part III.B., the section on harmless error, in lieu of which we substitute the revised analysis below. We conclude that, even under the less stringent harmless-error standard enunciated in *Brecht,* the *Johnson* error in this case was not harmless. Accordingly, we once again reverse the denial of habeas relief as to sentencing, vacate Duest's death sentence, and remand the case to the district court for further proceedings.

III.

B. Harmless Error

1.

[1,2] *Brecht v. Abrahamson,* 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.353 (1993), adopts as the standard for harmless constitutional error in federal habeas corpus cases the harmless-error standard federal appellate courts use on direct review as to nonconstitutional error.[2] That standard

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2 The harmless-error standard for constitutional violations in all other situations remains the long-standing test of *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967): whether the State has proved the error was harmless beyond a reasonable doubt.

first was articulated nearly a half-century ago in *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.1557 (1946). *See Brecht,* 507 U.S. at ___, 113 S.Ct. at 1714. Under *Kotteakos,* reversal is appropriate only when error resulted in "actual prejudice" to the defendant. *Brecht,* 507 U.S. at ___, 113 S.Ct. at 1722 (*citing United States v. Lane,* 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986); *Cumbie v. Singletary,* 991 F.2d 715, 724 (11th Cir. 1993). The Supreme Court has identified the precise contours of this standard in several cases reaching back to *Kotteakos.*[3]

[3] Simply put, "actual prejudice" occurs when constitutional error " 'ha[s] substantial and injurious effect or

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3 The threshold issue in all harmless-error inquiries is whether the violation in question amounts to "trial error" or a "structural defect." Structural defects are not susceptible to harmless-error analysis; trial errors are. *Arizona v. Fulminante,* 499 U.S. 279, _____, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991) (Rehnquist, C.J., delivering the opinion of the Court) Trial error "occur[s] during the presentation of the case to the jury, and...may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Id.* at ___, 111 S.Ct. at 1264. Structural defects, by contrast, compromise the entire trial process; they involve deprivations of constitutional protections so basic that in their absence no criminal trial can be deemed reliable, nor any punishment fundamentally fair. *Id.* at ____, 111 S.Ct. at 1265. Examples of trial error include the admission of an involuntary confession, *see id.* at ___, 111 S.Ct. at 1264, and the improper use at trial of a defendant's silence after receiving *Miranda* warnings, *see Brecht,* 507 U.S. at ___, 113 S.Ct. at 1717. Typical structural errors are the total deprivation of the right to counsel at trial and the unlawful exclusion of members of the defendant's race from the grand jury. *Fulminante,* 499 U.S. at ___, 111 S.Ct. at 1265.

The *Johnson* error in this case unquestionably was a trial error. Like the admission of an involuntary confession, the admission of evidence of a subsequently-vacated conviction is a constitutional error which occurs during the presentation of evidence. Its impact is capable of quantitative assessment in relation to all the evidence at trial in order to determine whether it was harmless. It does not infect the entire trial process like the deprivation of trial counsel or the presence at trial of a biased judge. *See Fulminante,* 499 U.S. at ___, 111 S.Ct. at 1265. Thus, we properly turn to analyze under *Brecht* whether the error in this case merits habeas relief.

influence in determining the jury's verdict.'" *Lane,* 474 U.S. at 449, 106 S.Ct. at 732 (quoting *Kotteakos,* 328 U.S. at 776, 66 S.Ct. at 1253); *see Brecht,* 507 U.S. at ___, 113 S.Ct. at 1722 (same). It does not require a showing that but for the error the jury would have rendered a verdict in favor of the defendant. *Kotteakos,* 328 U.S. at 763, 66 S.Ct. at 1247 (admonishing that reviewing court should not "speculate upon probable reconviction"); *see Brecht,* 507 U.S. at ___, 113 S.Ct. at 1724 (Stevens, J., concurring); *McKinney v. Rees,* 993 F.2d 1378, 1385-86 (9th Cir. 1993). Nor is it relevant whether the reviewing court is persuaded that the defendant is guilty. *Kotteakos,* 328 U.S. at 763, 66 S.Ct. at 1247. "[I]t is not the appellate court's function to determine guilt or innocence." *Id.* As Justice Rutledge explained in *Kotteakos,* the issue is not

> were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men [or women], not on one's own, in the total setting.
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> .....
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> .....[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-65, 66 S.Ct. at 1247-48, *quoted in part in Brecht,* 507 U.S. at ___, 113 S.Ct. at 1724 (Stevens, J., concurring), *and in Lane,* 474 U.S. at 449, 106 S.Ct. At 732 (citations omitted) (emphasis added). The essential question is: Did the constitutional error "substantially influence" the verdict, or, at least, does a "grave doubt" exist as to whether it did? *See, e.g. Bank of Nova Scotia v. United States,* 487 U.S. 250, 256, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228 (1988); *United States v. Mechanik,* 475 U.S. 66, 78, 106 S.Ct. 939, 945, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring). If so, then the petitioner is entitled to habeas relief.

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[4] Harmless error is a mixed question of law and fact subject to *de novo* review by this court. *Jackson v. Dugger,* 931 F.2d 712, 717 (11th Cir.), *cert. denied,* ___U.S.___, 112 S.Ct. 452, 116 L.Ed.2d 470 (1991).[4] Our task is to examine the entire record and determine whether, in the full context of Duest's trial and sentencing hearing, the *Johnson* error was harmless under the principles discussed above. In our opinion, it was not.

[5-7] Initially, we note that Duest's sentencing jury recommended death by the slim margin of 7-5. Under Florida law, a 6-6 split is deemed a recommendation against the death penalty. *E.g. Harich v. State,* 437 So.2d 1082, 1086 (Fla. 1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). The sentencing judge may override the jury's recommendation of life only if no person reasonably could conclude that life imprisonment is an appropriate punishment for this defendant. *Hall v. State,* 541 So.2d 1125, 1128 (Fla. 1989); *Tedder v. State,* 322 So.2d 908, 910

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4 Hence, we are not bound by the Florida Supreme Court's determination on state postconviction review that Duest's *Johnson* claim was harmless under *Chapman. See Duest v. Dugger,* 555 So.2d 849, 851 (Fla. 1990).

(Fla. 1975). Given the State's concession that "plenty" of nonstatutory mitigating evidence was present in this case, *see* State Postconviction Tr. at 121, an override would not have been proper had the jury recommended life. Thus, habeas relief is warranted in this case if we believe even one of the jurors who voted in favor of the death penalty likely was substantially influenced by the evidence of Duest's prior conviction.

Several facts persuade us that such a likelihood exists. Most important, Duest's sentencing jury was permitted to consider evidence that was materially inaccurate; the jury did not merely consider properly-admitted evidence in an improper way. That un-constitutional evidence — a subsequently over-turned conviction for armed assault with intent to murder-helped portray Duest to the jury not only as an individual with a propensity for criminal violence, but as a recidivous killer. As we previously wrote: "The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death." *Duest v. Singletary,* 967 F.2d 472, 482 (11th Cir. 1992), *vacated on other grounds,* 507 U.S. ___, 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993). Furthermore, the jury requested to see the vacated convictions after having deliberated for some time. This fact "suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence." *Id.* Although it is unclear how much time elapsed between the jury's request and its arrival at a recommendation of death, the fact that the sentencing hearing took only one day, when combined with the circumstances surrounding the jury's decision, further calls into question the reliability of the jury's recommendation. *Id.* We recognize that the State established three valid aggravating circumstances. Nevertheless, especially when viewed in the light of the close jury vote and the mitigating circumstances, we believe the facts

discussed indicate that at least one juror who recommended the death penalty likely was substantially influenced by the vacated conviction.

* * *

In accordance with our earlier disposition of this appeal, we REVERSE the district court's denial of Duest's petition for a writ of habeas corpus, VACATE Duest's sentence of death, and REMAND the case to the district court for further proceedings consistent with this opinion.

COX, Circuit Judge, specially concurring:

I concur in the result.

No. 92-1163. Harry K. Singletary, Secretary, Florida Department of Corrections, Petitioner v. Lloyd Duest

April 26, 1993. On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Brecht v Abrahamson*, 507 US ___, 123 L.Ed 2d 353, 113 S Ct ___(1993). Justice Blackmun, Justice Stevens, and Justice O'Connor dissent.

Same case below, 967 F2d 472.

LLOYD DUEST, Petitioner-Appellant,

v.

HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 90-6009.

United States Court of Appeals, Eleventh Circuit

July 15, 1992.

After his conviction of first-degree murder and death sentence were affirmed on direct appeal, 462 So.2d 446, and denial of his request for postconviction relief was affirmed, 555 So.2d 849, petitioner sought habeas relief. The United States District Court for the Southern District of Florida, No. 90-6045-CIV, Kenneth L. Ryskamp, J., denied petition, and petitioner appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) failure to disclose bus ticket that would have corroborated portion of petitioner's alibi defense was not *Brady* violation, but (2) jury's consideration of conviction and sentence that was later vacated was reversible error under Eighth Amendment.

Conviction affirmed; denial of writ reversed, death sentence vacated, and matter remanded.

1. Criminal Law 641.13(2)

Trial counsel did not provide ineffective assistance by failing to object to improper prosecutorial statements during trial, as statements were such that they did not render

trial so fundamentally unfair as to amount to denial of due process, and any objection would have proven fruitless. U.S.C.A. Const.Amends. 6, 14.

2. Criminal Law 641.13(1)

Habeas petitioner must show that his lawyer performed deficiently, and that such deficient performance prejudiced his client, in order to prove ineffective assistance of counsel. U.S.C.A. Const.Amend.6.

3. Habeas Corpus 842

Ineffective assistance of counsel claim presents mixed question of law and fact and is therefore subject to de novo review U.S.C.A. Const.Amend.6.

4. Criminal Law 1171.1(2)

Prosecutorial misstatements do not constitute reversible error unless such misstatements render trial so fundamentally unfair as to amount to denial of due process. U.S.C.A. Const.Amend.14.

5. Criminal Law 641.13(7)

Appellate counsel did not provide ineffective assistance in failing to challenge on direct appeal trial court's admission at trial of flight evidence and collateral misconduct, as there was no resulting prejudice in view of appellate determination that challenge to admission of flight evidence would have been unavailing and that admission of collateral-conduct was, at most, harmless error. U.S.C.A. Const.Amend.6.

6. Habeas Corpus 493(3)

Habeas petitioner could not show that, viewed in light most favorable to prosecution, evidence could not have permitted reasonable trier of fact to conclude that he was guilty of first-degree murder beyond reasonable doubt, as was necessary for him to obtain relief for insufficiency of evidence, despite his alibi evidence.

7. Habeas Corpus 422

Petitioner was procedurally barred from raising issue of improper introduction of flight and alias evidence in federal habeas proceeding, where Florida Supreme Court relief on his failure to raise issue on direct appeal in denying post-conviction relief on claim.

8. Criminal Law 700(4)

There was no *Brady* violation in state's failure to furnish to defense witness statements that, it was argued, could have been used to impeach state's witnesses at trial, as none of the statements sought in any way raised possibility that outcome of trial would have been different.

9. Criminal Law 700(3)

There was no *Brady* violation in state's failure to provide bus ticket that would have corroborated portion of defendant's alibi defense, as there was no reasonable probability that outcome of proceeding would have been different had ticket been disclosed, in view of testimony presented by state that defendant was present in city where crime occurred during relevant time, failure of ticket to give any indication as to who used it, and jury's rejection of alibi evidence that was more compelling than ticket.

10. Criminal Law 700(2)

Defendant seeking to establish *Brady* violation must prove: that government possessed evidence — which may include impeachment evidence — favorable to defense; that defendant did not possess evidence, and could not obtain it with any reasonable diligence; that prosecution suppressed evidence; and that, had evidence been disclosed to defense, reasonable probability existed that outcome of proceedings would have been different.

Criminal Law 1213.7

Jury's consideration of prior conviction, later vacated, in recommending death sentence violated Eighth Amendment. U.S.C.A. Const.Amend.8.

12. Habeas Corpus 765

Federal courts are not bound by state court determinations as to whether constitutional error is harmless.

13. Habeas Corpus 842

Whether constitutional error rises to level of reversible error is mixed question of law and fact, reviewable de novo.

14. Habeas Corpus 508

Eighth Amendment error in jury's consideration of prior conviction, later vacated, in recommending death sentence was not harmless, considering that jury requested to see vacated conviction after having deliberated for a time, that entire sentencing hearing took only one day, and that jury recommended death by narrowest of margins. U.S.C.A. Const.Amend.8.

Martin J. McClain, Tallahassee, Fla., for petitioner-appellant.

Celia A. Terenzio, Asst.Atty.Gen.,West Palm Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

Petitioner Duest was convicted of the first-degree murder of John Pope and sentenced to death. The Florida Supreme Court affirmed Duest's conviction and sentence on direct appeal, *Duest v. State,* 462 So.2d 446 (Fla. 1985), and denied all post-conviction relief. *Duest v. Dugger,* 555 So.2d 849 (Fla. 1990). Duest now appeals from the district court's denial of a writ of *habeas corpus,* which petitioner sought on several grounds. We affirm the district court's denial of relief with respect to Duest's conviction for first-degree murder. Because, however, the sentencing jury's consideration of a conviction and sentence later vacated by the Commonwealth of Massachusetts constituted reversible error under the Eighth Amendment and *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), we vacate Duest's death sentence and remand to the district court.

I. BACKGROUND AND COURSE OF PROCEEDINGS

John Pope was last seen alive on February 15, 1982 (President's Day), in Ft. Lauderdale, Florida, and was found dead early the following morning. Duest was arrested April 18, 1982, and on May 21, 1982, was charged by indictment with Pope's murder. During the March 1983 trial, held in Broward County, Florida, Duest relied on an alibi defense,

presenting both testimonial and documentary evidence that he had been in Massachusetts throughout President's Day Weekend (February 13-15) 1982 and until April 5, 1982, on which date he had arrived in Florida on a Trailways bus. In response, the prosecution presented seven witnesses, all of whom testified that they had seen Duest in the Ft. Lauderdale area during President's Day Weekend, and some of whom testified that they had seen Duest with Pope hours before the latter was found dead. Although the prosecution suggested that Duest's alibi witnesses had merely confused the dates of his appearance in and departure from Massachusetts, the prosecution never explicitly argued that Duest had not been in Massachusetts on April 5. The jury convicted Duest of first-degree murder on March 18, 1983.

On the following day, the penalty phase of the proceedings commenced. At this time, the government sought, *inter alia,* to show that Duest's prior criminal record contained two convictions for crimes of violence. Under Florida law, such crimes constitute an aggravating circumstance to be weighed by a sentencing jury against evidence of statutory and nonstatutory mitigating evidence. Fla.Stat.Ann. § 921.141(5)(b).[1] To establish this aggravating circumstance, the prosecution introduced into evidence two convictions from the Commonwealth of Massachusetts: one for armed robbery, and the other for

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1 Florida is a "weighing" state. In the sentencing phase of a capital trial, the jury must determine (1) whether sufficient aggravating circumstances exist as enumerated in Fla.Stat.Ann. § 921.141(5), (2) whether mitigating circumstances, both statutory and nonstatutory, exist which outweighed the aggravating circumstances, and (3) based on this calculus, whether death is the appropriate sentence. Fla.Stat.Ann. § 921.141(2). Unlike other weighing states such as Mississippi, however, the sentence reached by a Florida capital jury is purely advisory. Under Fla.Stat.Ann. § 921.141(3), the trial court, the sentencer under Florida law, must itself ultimately weigh aggravating and mitigating circumstances in determining whether death is the appropriate sentence. Fla.Stat.Ann. § 921.141(3).

armed assault with intent to murder.[2] After the introduction of the second conviction, the sentencing court spoke to the jury as follows:

> State's Exhibit No. 2 is a certified copy from the Commonwealth of Massachusetts, Superior Court, Department of the Trial Court. This is a conviction for armed assault to murder. The defendant pled guilty on January 13, 1971, and was sentenced to a term not exceeding ten years, nor less than five years. I will read this Indictment to you, also. It says, "Commonwealth of Massachusetts. The Superior Court. At the City of Cambridge, within and for the County of Middlesex, on the first Monday of April, in the year of our Lord one thousand nine hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present that Lloyd Paul Duest on the 4th day of March in the year of our Lord one thousand nine hundred and seventy, at Reading, in the County of Middlesex, aforesaid being armed with a dangerous weapon, did assault Herbert McSheehy and Leo Iacopucci...with intent to murder them against the peace of said Commonwealth and contrary to the Statute in such case and provided...

Trial Transcript at 1574-75. The court gave to the jury no additional facts regarding this conviction other than those contained in the Indictment.

After the jury returned from deliberating over Duest's sentence, it asked to see the criminal records pertaining to Duest's Massachusetts convictions. *Id.* at 1631. The court proceeded to re-read to the jury each indictment and notice of guilty plea and sentence. *Id.* at 1631-33. After this second

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2 Duest had pled guilty to both crimes.

reading, the jury returned to its deliberations, and subsequently recommended a sentence of death by a seven to five vote. It is not clear from the record how much time elapsed between the time the court re-read the prior convictions to the jury and the time that the jury recommended death; the sentencing phase, however, lasted only one day. On April 24, 1983, the trial court accepted the jury's recommendation and sentenced Duest to death. The trial court found four aggravating factors to exist, including the "prior crimes of violence" circumstance listed in Fla.Stat.Ann. § 921.141(5)(b), and none of the statutory mitigating factors listed in Fla.Stat.Ann. § 921.141(6).

The Florida Supreme Court affirmed Duest's first-degree murder conviction and death sentence. *Duest v. State,* 462 So.2d 446 (Fla. 1985). Subsequently, the Massachusetts Court of Appeals vacated Duest's conviction for armed assault with intent to murder on the grounds that the indictment did not charge Duest with conduct sufficient to prove he acted with intent to murder. *Commonwealth v. Duest,* 26 Mass. App.Ct. 137, 524 N.E.2d 1368 (1988).[3] On October 20, 1988, the armed assault charge against Duest was nolle prossed. Duest then moved for post-conviction relief under Fla.R.Crim.P. 3.850, alleging, *inter alia,* that the sentencing jury's consideration of Duest's vacated prior conviction in Massachusetts was invalid, and that resentencing was required. While conducting discovery after the filing of that

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3 Duest's 1988 appeal involved his attempt to withdraw his pleas as to both of the aforementioned convictions. Under *Commonwealth v. Henson,* 394 Mass. 584, 476 N.E. 2d 947 (1985), a case decided after Duest's conviction but given retroactive effect, Massachusetts treated armed assault with intent to murder as attempted murder, requiring proof of intent. Duest argued that the indictment charging assault with intent to murder did not reflect evidence of intent to murder. The Commonwealth of Massachusetts agreed with Duest's contention in light of *Henson;* therefore, the Massachusetts Court of Appeals accepted the withdrawal of Duest's plea and accordingly vacated his conviction.

motion, Duest's counsel discovered in the State files containing Duest's personal effects a Trailways bus ticket, bearing no name, showing travel from Boston to Ft. Lauderdale on April 5, 1982. Duest proceeded to amend his 3.850 motion to include a claim that the government, by withholding the bus ticket, had withheld material exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963), and that therefore a new trial was necessary. On January 4, 1989, the trial court held evidentiary hearings on the *Brady* issue and on Duest's claim that the jury's consideration of the vacated Massachusetts conviction required resentencing, but ultimately denied Duest all relief on the 3.850 motion. At the hearings, the State conceded that the defendant had put on a wealth of nonstatutory mitigating evidence at trial.

Duest then petitioned for a writ of *habeas corpus* in state court, alleging, *inter alia,* (1) the *Brady* violation referred to *supra,* as well as other *Brady* claims; (2) that the sentencing jury's improper consideration of a prior conviction that had subsequently been vacated by the Massachusetts courts entitled Duest to a new sentencing proceeding, under *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); and (3) ineffective assistance of counsel at the guilt, sentencing and appellate phases of the proceedings.

The Florida Supreme Court denied *habeas* relief and affirmed the trial court's denial of Duest's motion for Rule 3.850 post-conviction relief. *Duest v. Dugger,* 555 So.2d 849 (Fla. 1990). On the *Brady* issue, the Court held that although the State had inadvertently failed to furnish the bus ticket to the defense, the introduction of the ticket would not have affected the outcome of the case, given the jury's complete rejection of Duest's alibi defense. *Duest v. Dugger,* 555 So.2d at 850-51. The Court also rejected Duest's claim under *Johnson v. Mississippi,* stating that it "believe[d]

beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of [the vacated] conviction." *Id.* at 851. The Florida Supreme Court also denied relief on the remainder of Duest's claims.

Duest then petitioned for *habeas* relief in Federal District Court, asserting 25 different claims. In an Order dated September 19, 1990, the district court denied relief on all claims, holding that some of the claims were procedurally barred, and that others had no merit. *Duest v . Dugger,* No. 90-6046-CIV-RYSKAMP-(S.D.Fla. Sept. 19, 1990) (hereinafter "September 19 Order"). Duest appeals the district court's determination as to several of these claims. Specifically, Duest makes the following arguments before this court:

> (1) Duest is entitled to a new trial in light of the government's withholding of material exculpatory evidence under *Brady* (Issue I);
>
> (2) Resentencing is appropriate because of the sentencing jury's impermissible consideration of the vacated Massachusetts conviction (Issue II);
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> (3) An evidentiary hearing on the issue of ineffective assistance of counsel at sentencing must be held in district court (Issue III).
>
> (4) Duest was denied effective assistance of counsel at trial by virtue of his lawyer's failure to object to improper prosecutorial statements during the guilt and sentencing phases (Issue IV);
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> (5) Duest was denied effective assistance of appellate counsel by virtue of appellate counsel's failure to raise several different issues on appeal (Issue V);
>
> (6) There was insufficient evidence to convict Duest of first-degree murder (Issue VI);

(7) The trial court committed reversible error at sentencing by issuing insufficient instructions regarding aggravating factors, in violation of *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988) (Issue VII);

(8) Duest's was denied his right to a fair trial because of the introduction at trial of flight evidence and evidence of Duest's use of an alias (Issue VIII);

(9) the trial court committed reversible error at sentencing when it instructed the jury that a majority vote (seven of twelve jurors) was needed to return a verdict of life imprisonment as opposed to death (Issue IX); and

(10) Resentencing is appropriate because the trial court's penalty phase instructions impermissibly shifted the burden of proof to Duest to prove that life imprisonment was the appropriate punishment (Issue X).

As noted *supra,* we affirm the district court's denial of *habeas* relief regarding Duest's conviction, but reverse the district court's denial of relief regarding sentencing.

II. DUEST'S CONVICTION

Duest makes several claims regarding the alleged unlawfulness of his conviction, including those claims identified *supra* as Issue I (the *Brady* violations); Issue IV to the extent the prosecutorial misstatements took place at the guilt phase of the trial); Issue V (to the extent that appellate counsel failed to raise on appeal issues arising out of the guilt phase of the trial); Issue VI (sufficiency of the evidence); and Issue VIII (erroneous admission of flight evidence and evidence of use of an alias).

Because Duest's *Brady* claim is the sole claim pertaining to Duest's conviction that merits extended treatment here, we reserve that discussion for last, and address Duest's other claims first.

A. Ineffective Assistance of Counsel — Guilt Phase (Issue IV)

[1-3] With respect to Duest's claim that he was denied ineffective assistance of trial counsel at the guilt phase by virtue of his counsel's failure to object to improper prosecutorial statements, we note that in order to prove ineffective assistance of counsel, a *habeas* petitioner must show that his lawyer performed deficiently, and that such deficient performance prejudiced his client. *Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); United States v.Yizar,* 956 F.2d 230, 232 n.8 (11th. Cir. 1992). An ineffective assistance of counsel claim presents a mixed question of law and fact and is therefore subject to *de novo* review. *Lusk v. Dugger,* 890 F.2d 332, 336 (11th. Cir.), *cert. denied,* ___U.S.___, 110 S.Ct. 3297, 111 L.Ed.2d 805 (1990).

[4] In this case, whether or not trial counsel behaved deficiently, his failure to object to the prosecutor's allegedly improper statements did not prejudice his client. To prove prejudice, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Yizar,* 956 F.2d at 232 n. 13 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068). Prosecutorial misstatements do not constitute reversible error unless such misstatements render the trial so fundamentally unfair as to amount to a denial of due process. *Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). Given the nature of the

(mis)statements in this case, the prosecutor's behavior in this case did not render Duest's trial so fundamentally unfair as to amount to a denial of due process. Thus, any objection by defense counsel would have proven fruitless. Defense counsel's failure to object to these statements were not ineffective assistance.

B. Ineffective Assistance of Appellate Counsel (Issue V)

[5] With respect to Duest's allegations on ineffective assistance of appellate counsel for failure to raise on appeal claims arising out of the guilt phase of Duest's trial, it is claim that the petitioner has not sustained his burden of proving prejudice resulting from appellate counsel's alleged deficient performance. *See Strickland, supra.*[4] In assessing the likelihood of success of a direct appeal, we must accord deference to the Florida Supreme Court's decisions to the extent the Court has decided one of the underlying state law issues giving rise to the ineffective assistance claim. *Alvord v. Wainwright,* 725 F.2d at 1291. Duest contends that appellate counsel was ineffective for failing to raise on appeal (1) the trial court's admission of flight evidence at trial; and (2) the trial court's admission of collateral misconduct.

In denying Duest state *habeas* relief and in affirming the trial court's denial of Duest's 3.850 motion, however, the Florida Supreme Court addressed petitioner's substantive state law claims on the merits. The court concluded that under prevailing Florida law, petitioner's arguments regarding the admission of flight and alias evidence "would

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4 The standard of proof and standard of review are the same in the context of ineffective assistance of appellate counsel as in the context of ineffective assistance of trial counsel. *Alvord v. Wainwright,* 725 F.2d 1282, 1291 (11th Cir.), *cert. denied,* 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291(1984).

have been unavailing had it been raised on appeal." *Duest v. Dugger,* 555 So.2d at 852, and that the admission of collateral conduct was, at most, harmless error. *Id.* at 853. Thus, given the Florida Supreme Court's rejection of Duest's underlying state claims, no prejudice resulted from the failure of Duest's appellate counsel to raise these claims on appeal.

C. Insufficient Evidence of First-Degree Murder (Issue VI)

[6] We find no merit to Duest's contention that there was insufficient evidence to convict him of first-degree murder. To prevail on a sufficiency of the evidence claim, petitioner must show that, viewed in the light most favorable to the prosecution, the evidence in this case could not have permitted a reasonable trier of fact to conclude that Duest was guilty beyond a reasonable doubt of first-degree murder. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Petitioner cannot make such a showing in this case.

D. Introduction of Flight/Alias Evidence (Issue VIII)

[7] The Florida Supreme Court relied on an independent and adequate state procedural ground — that is, Duest's failure to raise the issue of improper introduction of flight and alias evidence on direct appeal — in denying relief on this claim. *Duest v. Dugger,* 555 So.2d at 851. Therefore, Duest is procedurally barred from raising this claim in a federal habeas proceeding. *Wainwright v. Sykes,* 433 U.S. 72, 81-83, 97 S.Ct. 2497, 2503-04, 53 L.Ed.2d 594 (1977).[5]

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5 As noted in Section II.B, *supra,* Duest also raises claims in the context of his claim of ineffective assistance of appellate counsel. As discussed therein, the claims have no merit.

E. Brady Violation (Issue I)

[8,9] In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1197. In *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court noted that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383.

[10] Under the law of this circuit, a defendant seeking to establish a *Brady* violation must prove (1) that the government possessed evidence — which may include impeachment evidence — favorable to the defense; (2) that the defendant did not possess the evidence, and could not obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v. Meros,* 866 F.2d 1304, 1308 (11th.Cir.), *cert. denied,* 493 U.S. 932, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). There is no question but that the first three of these requirements have been met in this

case.[6] The question is whether, had the evidence been disclosed to the defense, a reasonable probability existed that the outcome of the proceedings would have been different. This issue presents a mixed question of law and fact, reviewable *de novo. See United States v. Rivalta,* 925 F.2d 596, 597-98 (2d Cir.), *cert.denied,* ___U.S.___, 112 S.Ct. 215, 116 L.Ed.2d 173 (1991).

Duest has presented several *Brady* claims based on the failure of the State to furnish to the defense various witness statements that, Duest argues, could have been used to impeach the State's witnesses at trial. Although such impeachment evidence falls within the *Brady* rule under *Giglio v. United States,* 405 U.S. 150, 154-55, 92 S.Ct.763, 766, 31 L.Ed.2d 104 (1972), none of the statements sought by the defense in any way raised the possibility that the outcome of the trial would have been different. Accordingly, we reject Duest's *Brady* claims with respect to these statements. Duest's claim regarding the April 5 bus ticket merits more extended discussion.

Duest contends that the April 5 Trailways bus ticket served to bolster the contentions of the defense that Duest had been in Massachusetts during President's Day Weekend 1982 and through April 5, 1982, the date on which, according to the defense, Duest left Boston for Ft.Lauderdale. Duest

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6 The third prong of the *Meros* test does not require that proof of "suppression" of the alleged *Brady* Material be accompanied by evidence of deliberate withholding of such evidence by the State. "The Supreme Court has recognized that 'suppression' for purposes of a *Brady* analysis is not 'measured by the moral culpability, or the willfulness of the prosecution.' " *United States v.Spagnoulo,* 960 F.2d 990 (11th.Cir. 1992) (quoting *United States v. Agurs,* 427 U.S. 97, 110, 96 S.Ct.2392, 2400, 49 L.Ed.2d 342 (1976). Thus, although the parties dispute whether the State deliberately or inadvertently withheld the bus ticket from the defense, this dispute is of no significance for *Brady* purposes to the question of whether evidence was suppressed.

suggests that because the prosecution focused on the credibility of Duest's alibi witnesses, the existence of the bus ticket would have enhanced the credibility of these witnesses such that a reasonable probability exists that the jury would have accepted Duest's alibi. We disagree.

As noted by the Florida Supreme Court, the prosecution presented seven witnesses who testified that Duest had been in Ft. Lauderdale on President's Day Weekend. These witnesses included a man who allegedly had sat next to Duest on the two-day bus trip from New York to Ft. Lauderdale that landed Duest in Florida on President's Day weekend, as well as women with whom Duest allegedly shared an apartment in Florida that weekend. The jury clearly believed these witnesses rather than Duest's alibi witnesses, most of whom were family members or friends. The existence of the April 5 bus ticket in no way impeaches the testimony of the prosecution's witnesses, in that the ticket indicates only that *someone* traveled from Boston to Ft. Lauderdale on April 5, and says nothing about Duest's whereabouts during the President's Day Weekend.

Admittedly, the existence of the ticket serves to corroborate the testimony of Duest's parents that they put him on a Ft. Lauderdale-bound bus in Boston on April 5. None of Duest's alibi witnesses, however, testified that Duest was in Boston the entire period between February and April 1982. Thus, the existence of the bus ticket in no way contradicts the prosecution's contention, accepted by the jury, that Duest was in Ft. Lauderdale, on President's Day Weekend. At oral argument, Duest's counsel conceded that the prosecution never argued explicitly that Duest had not been in Massachusetts on April 5.

The fact that the bus ticket serves to corroborate a part of Duest's story that is not directly relevant to the crime

charged does not justify a finding for Duest on the fourth prong of the *Meros* test. In *United States v. Booz,* 451 F.2d 719 (3d Cir. 1971), the Third Circuit addressed a situation similar to the one posed in this case. In *Booz,* the prosecution suppressed evidence in the form of statements by local townspeople corroborating the defendant's story as to his whereabouts between 9:30 AM and 10:00 AM the day of a bank robbery for which he was charged. The court found that no *Brady* violation occurred because the bank robbery had occurred between 8:30 AM and 9:00 AM: "[e]vents occurring later in the day...could lend no support to appellant's case." *Booz,* 451 F.2d t 725. Thus, even though the withheld statements in *Booz* served to corroborate a portion of the defendant's story, they did not corroborate the portion of the story involving the defendant's whereabouts at the time of the crime. If corroboration of events occurring an hour after commission of the crime lend no support to a defendant's case, corroboration of events occurring months after commission of a crime can have even less relevance to a defendant's case.

Finally, we note that the jury rejected alibi evidence as to Duest's whereabouts on President's Day Weekend that was more compelling than the April 5 bus ticket. The jury failed to be swayed by introduction of an auto parts store receipt from Watertown, Massachusetts, dated February 15, bearing the name of "Duest."[7] As stated by the District Court in its September 19 Order, "[u]nder *Bagley,* there is no reasonable probability that an April bus ticket would have convinced the jury that Duest did not commit the February murder, when the jury did not believe a hardware store owner who produced a February receipt that purportedly

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7 The receipt did not include a first name. The store owner, however, testified that the defendant himself was a party to the February 15 transaction reflected on the receipt.

showed that Duest was in Massachusetts when Pope was killed." September 19 Order at 12.

Accordingly, we reject Duest's *Brady* claims in their entirety. Because we also reject the remainder of Duest's claims as they pertain to his conviction for first-degree murder, we affirm the district court with respect to Duest's conviction for first-degree murder.

III. DUEST'S SENTENCE

Duest also challenges his death sentence on a number of different grounds, including those grounds identified *supra* as Issue II (the *Johnson v. Mississippi* claim relating to Duest's vacated prior conviction); Issue III (ineffective assistance of counsel at sentencing); Issue IV (to the extent the prosecutorial misstatements took place at the penalty phase of the trial); Issue V (to the extent that appellate counsel failed to raise on appeal issues arising out of the penalty phase of the trial); Issue VII (insufficient instructions at sentencing phase on "heinous, atrocious and cruel" aggravating circumstance); Issue IX (erroneous instructions regarding votes necessary for a life sentence); and Issue X (improper burden-shifting instruction at penalty phase). Because we agree with Duest that resentencing is appropriate on the ground raised in Issue II, we need not reach the other issues raised by Duest pertaining to his sentence.

Duest's Johnson v. Mississippi Claim (Issue II)

As noted *supra,* Duest contends that because the sentencing jury's recommendation of death was based upon consideration of a criminal conviction that was later vacated by the Massachusetts courts, resentencing is in order under *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Two questions must be answered in order to decide Duest's claim. First, did the sentencing jury's

consideration of Duest's prior vacated conviction amount to Eighth Amendment error under *Johnson?* Second, if so, did the Florida Supreme Court err in concluding that the Eighth Amendment error was harmless?

A. Eighth Amendment Error

[11] In *Johnson,* the sentencing jury found three aggravating circumstances regarding Johnson's murder of a Mississippi highway patrolman, one of which was that Johnson had "previously been convicted of a felony involving the use or threat of violence of the person of another." [8] The sole evidence supporting this aggravating circumstance was an authenticated copy of petitioner's commitment following his 1963 conviction in New York State for second-degree assault with intent to commit first-degree rape. The prosecutor repeatedly referred to this conviction during sentencing. Because the three aggravating circumstances outweighed the mitigating circumstances, the Mississippi jury, the sentencer under Mississippi law, sentenced Johnson to death. In 1987, after the Mississippi jury passed its sentence, the New York Court of Appeals reversed Johnson's conviction for second-degree assault with intent to commit first-degree rape on the grounds that Johnson's confession was coerced.[9] Despite the sentencing jury's consideration of this invalid conviction, the Mississippi Supreme Court affirmed Johnson's death sentence.

The United States Supreme Court reversed and remanded the case to the state courts for resentencing. The Court held that the sentencing jury's consideration of the invalid conviction violated the Eighth Amendment because

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8 Mississippi, like Florida, is a "weighing" state. *See* note 1, *supra.*

9 The reasons for the 24-year delay between Johnson's New York conviction and the New York Court of Appeals' reversal are irrelevant to the issue before us.

the decision to sentence Johnson to death was predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Johnson,*486 U.S. at 585, 108 S.Ct. at 1986 (quoting *Zant v. Stephens,* 462 U.S. 862; 884-85, 887 n. 24, 103 S.Ct. 2733, 2747, 2748 n. 24, 77 L.Ed.2d 235 (1983).

Thus, *Johnson* stands for the proposition that a sentencing jury's consideration of a vacated conviction in establishing aggravating factors violates the Eighth Amendment because such consideration undermines the "need for reliability in the determination that death is the appropriate punishment." *Id.* at 584, 108 S.Ct. at 1986 (citations omitted). In assessing Duest's *Johnson* claim, the Florida Supreme Court implicitly recognized the existence of an Eighth Amendment violation. *Duest v. Dugger,* 555 So.2d at 851. The State does no dispute the existence of Constitutional error in this case.

B. Harmless Error

[12-14] Before examining whether the Eighth Amendment error in this case was harmless, we note that federal courts are not bound by state court determinations as to whether Constitutional error is harmless. *Jackson v. Dugger,* 931 F.2d 712, 717 (11th.Cir.), *cert. denied sub nom. Singletary v. Jackson,* ___U.S.___, 112 S.Ct. 452, 116 L.Ed.2d 470 (1991). Whether such error rises to the level of reversible error is a mixed question of law and fact, reviewable *de novo. Id.*

In *Johnson,* the State opposed Johnson's request for resentencing, arguing that because the Mississippi Supreme Court had concluded that the death sentence returned by the jury would have stood even absent Johnson's New York conviction, such resentencing was inappropriate. The United States Supreme Court rejected this argument. First, the Court noted that the Mississippi Supreme Court had

expressly refused to conduct a harmless error analysis, and that such refusal was appropriate, given that the prosecution had focused upon that aggravating factor far more than on the others. *Johnson,* 486 U.S. at 590 n. 8, 108 S.Ct. at 1988-89 n. 8. Second, and "more importantly," the Court noted that "the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible." Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate. *Id.* at 590, 108 S.Ct. at 1989.

As noted *supra,* the Florida Supreme Court rejected Duest's *Johnson* claim because it "believe[d] beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of [the vacated] conviction." — *Duest v.Dugger,* 555 So.2d t 851. [10] The Court noted that even if Duest's vacated Massachusetts conviction were not considered by the sentencing jury, (1) another conviction for armed robbery remained extant, thereby preserving the existence of the "prior crimes of violence" aggravating circumstance; and (2) three other aggravating factors existed independent of the "prior crimes of violence" factor. *Id.* The State, of course, agreed with the Florida Supreme Court, adding that, unlike the sentencing jury in *Johnson,* the sentencing jury in this case received only limited exposure to the vacated conviction: the prosecution never mentioned the conviction during the sentencing phase, and the court merely read and later re-read the indictments to the jury.

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10 This is the proper standard by which a court measures whether a constitutional violation is harmless error. *Clemons v. Mississippi,* 494 U.S. 738, 753, 110 S.Ct. 1441, 1451, 108 L.Ed. 2d 725 (1990); *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We agree with the district court in this case that the Florida Supreme Court conducted a harmless error analysis rather than independently reweighing the aggravating and mitigating circumstances. September 19 Order at 16-17.

Notwithstanding the Florida Supreme Court's analysis, and the contentions of the State, we hold that the Eighth Amendment error resulting from the sentencing jury's consideration of Duest's vacated Massachusetts conviction was not harmless.

The Supreme Court's decisions in *Johnson, supra* and *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), supports our holding, and help us identify the specific reasons why the Eighth Amendment error in this case was not harmless. As noted *supra,* the *Johnson* Court stated that, had the Mississippi Supreme Court conducted a harmless error review of the sentencing jury's consideration of Johnson's vacated New York conviction, such review would have yielded a determination that the error was not harmless. First, the Court pointed out that the prosecutor's focus on the vacated conviction made the jury's reliance on that conviction especially likely. *Johnson,* 486 U.S.at 590 n. 8, 108 S.Ct. at 1989 n. 8. The Court in *Clemons* likewise concluded that where the State "repeatedly emphasized and argued the [constitutionally impermissible aggravating factor] during sentencing,...it would require a detailed explanation based on the record for us to agree that the error in giving the invalid...instruction was harmless." *Clemons,* 494 U.S. at 753-54, 110 S.Ct. at 1451.

Although the jury in this case received less exposure to the vacated conviction, than did the jury in *Johnson,* the circumstances surrounding the jury's consideration of this conviction indicate that reversible error occurred here as well. The fact that the jury requested to see the vacated convictions after having deliberated for a time suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence. It is important to note that the jury did not request additional information or instruction from the trial court on any other matter. It is unclear from the

record how much time elapsed between the jury's request and its arrival at a recommendation of death; nevertheless, the fact that the entire sentencing hearing took only one day, combined with the other circumstances surrounding the jury's determination, further calls into question the reliability of the jury's recommendation. Finally, that the jury recommended death by the narrowest of margins renders its consideration of the vacated conviction especially problematic. Thus, the context in which the sentencing jury considered Duest's conviction undermines confidence in the jury's recommendation of death as much as the context in which the jury imposed death in *Johnson*.

The *Johnson* Court rejected a finding of harmless error not only because of the jury's particular exposure to Johnson's vacated conviction, but also because "the error [in *Johnson*] extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U.S. at 590, 108 S.Ct. at 1989. The *Clemons* Court reemphasized this distinction in holding that the Mississippi Supreme Court was not precluded from conducting a harmless error analysis on remand where the trial court, rather than admitting inaccurate and misleading evidence, merely had given an erroneous instruction regarding application of the "especially heinous atrocious and cruel" aggravating circumstance. *Clemons,* 494 U.S. at 754-55 n. 5, 110 S.Ct. at 1451 n. 5.

The Distinction drawn by the Court in *Johnson* and *Clemons* compels reversal here. Duest's sentencing jury was allowed to consider evidence that has been revealed to be materially inaccurate. Unlike the jury in *Clemons,* Duest's jury did not merely consider in an improper context evidence that had been admitted during the guilt phase; it considered evidence that incorrectly indicated that (1) Duest had been

convicted of a crime involving violence, and that (2) the underlying conduct for which he was convicted reflected a murderous intent. The fact that Duest may have committed some of the underlying conduct alleged in the indictment — that is, the armed assault — in no way renders harmless the effects such inaccuracies may have had on the jury. The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death.

In *Brown v. Dugger,* 831 F.2d 1547 (11th Cir. 1987), this court stated that:

> If there remains a possibility that the constitutionally-proscribed evidence impacted on the ultimate decisional process of the jury, if the beneficiary of the error cannot refute that possibility beyond all reasonable doubt, constitutional errors can never be deemed harmless.

Id. at 1554 (citing *Hutchins v. Wainwright,* 715 F.2d 512, 517 (11th. Cir. 1983), *cert. denied,* 465 U.S. 1071, 104 S.Ct.1427, 79 L.Ed.2d 751 (1984). It is apparent that the jury's particular focus on the vacated conviction prior to its 7-5 recommendation of death raises a serious possibility that such evidence impacted the ultimate decisional process of the jury. Under the circumstances of this case, the State cannot show beyond a reasonable doubt that the jury would have recommended death absent consideration

of the vacated Massachusetts conviction.[11] Therefore, the sentencing jury's consideration of the vacated conviction amounts to reversible error.[12]

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11 It is equally apparent that, had the sentencing jury recommended life, the trial court would not have overridden this recommendation and sentenced Duest to death. As conceded by the prosecution, there was "plenty of nonstatutory mitigating evidence present in this case" to support a jury determination of life imprisonment in this case. Under Florida law, a sentencing court may not override a jury recommendation of life imprisonment if the jury recommendation has a reasonable basis. *Hall v. State*, 541 So.2d 1125, 1128 (Fla. 1989). In this case, the nonstatutory mitigation would have furnished such a reasonable basis for a life recommendation.

12 This case is different from *Kennedy v. Dugger*, 933 F.2d 905 (11th Cir. 1991), *cert. denied* ___U.S.___,112 S.Ct. 957, 117 L.Ed.2d 124 (1992), in which this court rejected a *Clemons* claim on the ground that the Florida Supreme Court's harmless error review was correct. This court held that, even after the Florida Supreme Court discounted three out of seven aggravating factors on the grounds that the trial court had misapplied the statutory criteria as to those factors, four aggravating circumstances remained, as against one mitigating circumstance, and that therefore the Florida Supreme Court's harmless error analysis was correct. *Kennedy*, 933 F.2d at 911-12. Even though the balance of aggravating versus mitigating factors in this case is similar to the balance in *Kennedy*, given that three aggravating factors and no *statutory* mitigating factors were found by the trial court in this case, the cases are otherwise different, and underscore the distinction made by the United States Supreme Court in *Clemons* and *Johnson*. In *Kennedy* the information to which the jury was exposed was not materially inaccurate; indeed, as in *Clemmons*, the jury in *Kennedy* heard no evidence at sentencing that it could not have heard at any other point in the trial. This case, like *Johnson* and unlike *Kennedy*, involved (1) the jury's exposure to materially inaccurate information, (2) in a context which rendered that information particularly harmful to the defendant. Thus, the mere fact that the aggravating circumstances predominate over mitigating factors here in irrelevant given circumstances which undermine confidence in the jury's determination that death was the appropriate sentence. *Johnson*, 486 U.S. at 584, 108 S.Ct. at 1986.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM Duest's conviction for first-degree murder. We REVERSE the district court's denial of a writ of habeas corpus and VACATE Duest's death sentence. We REMAND the case to the district court for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

Miguel J. Cortez,
Clerk

October 7, 1992

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 90-6009 Duest v. Singletary
DC DKT NO.: 90-06045 CIV-KLR

The enclosed order has been entered on petition for rehearing.

See Rule,41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

Miguel J. Cortez, Clerk

Reply To: Joyce Pope (404) 331-2904

This order applies to both rehearings filed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-6009

LLOYD DUEST,
Petitioner-Appellant,
verses

HARRY K. SINGLETARY, Secretary.
Florida Department of Corrections,
Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit

Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE

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11th. Cir. R.41-1 **STAY OR RECALL OF MANDATE**

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing en banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R.35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6045-CIV-RYSKAMP

LLOYD DUEST,
Petitioner,
v.

RICHARD L. DUGGER, Secretary
Florida Department of Corrections,
Respondent.
_____/

MEMORANDUM ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Lloyd Duest filed this petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction for first degree murder and death sentence imposed April 14, 1983. The Florida Supreme Court described Duest's crime as follows:

> On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriffs was contacted. Upon arrival, the deputy sheriff found Pope on the

> bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Duest v. State, 462 So.2d 446, 448 (Fla. 1985).

After trial, the jury convicted Duest of first degree murder. The jury then voted 7-5 recommending that Duest receive the death penalty. The trial judge accepted the jury's recommendation and found the following aggravating circumstances as provided in the Florida Statutes: (1) Duest previously had been convicted of two violent felonies, armed robbery and assault with intent to commit murder, Fla. Stat. § 921.141(5)(b); (2) the capital felony was committed while Duest was engaged in the commission of a robbery, Fla. Stat. § 921.141(5)(d); (3) the capital felony was committed for pecuniary gain, Fla. Stat. § 921.141(5)(f); (4) the capital felony was especially heinous, atrocious, or cruel, Fla. Stat. § 921.141(5)(h); (5) the capital felony was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Fla. Stat. § 921.141(5)(i). The trial judge considered circumstances (2) and (3) as one, because of overlapping facts and legal interpretations, finding a total of four aggravating circumstances that applied to Duest's crime. The trial judge found no mitigating circumstances and imposed a death sentence in accord with the jury's recommendation. *Duest,* 462 So.2d at 449 (discussing aggravating and mitigating circumstances).

On direct appeal, both Duest's conviction and sentence were affirmed by the Supreme Court of Florida. *Duest,* 446 So.2d 446. Duest did not file a petition for certiorari to the United States Supreme Court. Thus, his conviction became final on January 10, 1985, the date the state supreme court denied his direct appeal.

Following his direct appeal, Duest sought post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal

Procedure. The state trial judge conducted an evidentiary hearing as to certain issues and eventually denied all relief. Duest appealed this ruling to the Supreme Court of Florida and also filed a petition for a writ of habeas corpus in that court under Fla. Stat. § 79.01. The Florida Supreme Court denied all relief. *Duest v. Dugger,* 555 So.2d 849 (Fla. 1990).

Duest filed this petition for writ of habeas corpus on January 19, 1990. It is his first federal petition. That day, this court stayed Duest's execution. The court now considers Duest's 341-page petition, which raised the following 25 separate claims:

I. The State unconstitutionally withheld material exculpatory evidence and introduced false and misleading evidence.

II. Duest's death sentence was based on a vacated prior conviction and therefore also on misinformation of constitutional magnitude.

III. The judge and jury considered and relied on the victim's personal characteristics, the impact of the offense on the victim's family, and the prosecutor's and family members' characterizations of the offense over defense counsel's timely objection.

IV. Duest was denied his right to trial by an impartial jury when the state introduced evidence of flight and evidence of Duest's use of an alias. The evidence and argument thereon was materially and intentionally inaccurate.

V. The sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, which was improperly argued and imposed.

VI. The "cold, calculated, and premeditated" aggravating circumstance was unconstitutionally applied to Duest's case.

VII. The sentencing judge unconstitutionally refused to find mitigating circumstances clearly set out in the record.

VIII. The penalty phase jury was unconstitutionally instructed so as to shift the burden of proof to Duest and the judge used this improper standard in imposing the death penalty.

IX. The trial judge unconstitutionally asserted that sympathy and mercy toward Duest were inappropriate considerations.

X. The prosecutor and trial judge impermissibly diminished the juror's understanding of their responsibility in the sentencing phase.

XI. The introduction of nonstatutory aggravating factors caused the death penalty to be imposed arbitrarily and capriciously.

XII. Duest's death sentence rests on an unconstitutional automatic aggravating circumstance.

XIII. Duest received ineffective assistance of counsel when his attorney failed to depose a potential state's witness because of a purported conflict of interest.

XIV. The state introduced statements taken in violation of Duest's constitutional rights and Duest received ineffective assistance of counsel in failing to suppress those statements.

XV. Duest received ineffective assistance of appellate counsel on direct appeal.

XVI. The state unconstitutionally introduced evidence of "other crimes" and undermined the reliability of the jury's determinations.

XVII. Defense counsel unreasonably and prejudicially misinformed the jury regarding the requisite burden of proof for establishing an alibi.

XVIII. Duest received ineffective assistance of counsel through failure to conduct an independent investigation and present compelling mitigating circumstances at sentencing.

XIX. Duest received ineffective assistance of counsel through failure to object to or restrain inappropriate prosecutorial comments and argument and failure to argue the applicability of nonstatutory mitigation.

XX. The trial judge relied on a hearsay presentence investigation report and conducted the sentencing hearing in an unconstitutional manner, and Duest received ineffective assistance of counsel through failure to address those shortcomings.

XXI. Duest received ineffective assistance of counsel through a conflict of interest in

rendering legal advice to Duest's alibi witnesses and was denied due process in that the trial judge also provided legal advice and the state threatened these witnesses.

XXII. Insufficient evidence existed to convince a rational trier of fact that Duest was guilty of premeditated murder beyond a reasonable doubt.

XXIII. Florida imposes the death penalty based on impermissible, arbitrary, and discriminatory factors, including race.

XXIV. Duest was denied a full and fair forum in state court.

XXV. The trial judge unconstitutionally gave the sentencing jury an erroneous instruction regarding the number of votes required for a recommendation of a life sentence.

First the court considers those claims that the Florida Supreme Court determined to be procedurally barred or waived. The court then considers the remaining claims in an order similar to that of the petition, although claims relating to ineffective assistance of counsel or conflict of interest are considered in the final section.

II. Claims Barred From Habeas Review Under An Adequate State Procedural Bar (Claims IV, VI, VII, XII, XVI)

The Florida Supreme Court found that five of Duest's claims were procedurally barred for failure to raise them on direct appeal and eleven were waived by his failure to properly present them in his appellate brief.

Generally, a state procedural bar precludes federal habeas review unless the petitioner establishes cause for his default and that prejudice resulted from that default. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (contemporaneous objection rule embodied in Florida Rule of Criminal Procedure 3.190(i) barred federal habeas consideration of whether statements admitted were voluntary). Alternatively, the petitioner must demonstrate that "a fundamental miscarriage of justice" will result if the bar is applied. *Murray v. Carrier,* 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397, 413 (1986) (quoting *Engle v. Isaac,* 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)). The cause and prejudice test also applies to procedural defaults during state collateral proceedings. *Presnell v. Kemp,* 835 F.2d 1567, 1580 (11th Cir. 1988) (Georgia successive petition rule), *cert. denied,* ___U.S.__, 109 S.Ct. 882, 102 L.Ed.2d 1004 (1989).

However, a procedural bar precludes federal review only if its constitutes an "adequate and independent state ground" for deciding the claim. *Harris v. Reed,* 489 U.S. 255, ___, 109 S.Ct. 1038, 1041-42, 103 L.Ed.2d 308, 315-16 (1989). Under *Harris,* whether a state court decision rests on an adequate and independent state ground for purposes of federal habeas review is subject to the "plain statement" rule of *Michigan v. Long,* 463 U.S. 1032, 1042 and n.7, 103 S.Ct. 3469, 3477 and n.7, 77 L.Ed.2d 1201, 1215 and n.7 (1983). *Harris,* 489 U.S. at ___, 109 S.Ct. at 1042, 103 L.Ed.2d at 316. Thus, a procedural bar does not preclude

consideration of a federal claim on direct or habeas review unless the last state court rendering judgment 'clearly and expressly' states that its judgment is based on a state procedural bar. *Caldwell v. Mississippi,* 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231, 238 (1985) (quoting *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S.Ct. 3468, 3476, 77 L.Ed.2d 1201, 1214 (1983)).

A state procedural rule is inadequate if its application in a particular setting is unforeseeable or if state courts have applied it inconsistently and sporadically. *Johnson v. Mississippi,* 486 U.S. 578, 587, 108 S.Ct. 1982, 1987, 100 L.Ed.2d 575, 585-86 (1988); *Spencer v. Kemp,* 781 F.2d 1458 (11th Cir. 1986) (en banc) (amendment to Georgia habeas corpus statute that state court applied retroactively to bar petitioner's claim not independent and adequate state ground precluding federal review).

In this case, the Florida Supreme Court determined that eleven of Duest's claims were waived because he did not provide argument on those claims in his appellate brief but merely referred to arguments presented in his Rule 3.850 motion. Accordingly, the state argues that these eleven claims are foreclosed from federal habeas corpus review. However, the state cites no other capital case in which such a procedural bar rule has been applied and cites only one 1955 criminal case in which a similar bar was applied. In contrast, Duest has filed a motion for summary judgment detailing capital cases in which the Florida Supreme Court has considered on the merits claims in which petitioners merely referred to arguments in their Rule 3.850 motions, as did Duest.

Considering the foregoing, this court concludes that the waiver rule used by the Florida Supreme Court to dispose of eleven of Duest's claims is not a state procedural bar based on independent and adequate state grounds. Accordingly, on

federal habeas review the court will consider these eleven claims, with the exception of three claims that are also procedurally barred because Duest failed to raise them on direct appeal, Claims VI, VII, and XII. This procedural bar rests on an independent and adequate state ground, as the Florida Supreme Court "has faithfully applied its rule that claims not raised on direct appeal cannot be raised on post-conviction review." *Dugger v. Adams,* 489 U.S. 401, 410, 109 S.Ct. 1211, 1217 n.6, 103 L.Ed.2d 435, 445 n.6 (1989); *see also Smith v. Dugger,* 840 F.2d 787, 796 (11th Cir. 1988) (Florida Supreme Court consistently applies both procedural default and contemporaneous objection rules in capital cases, so as to constitute adequate procedural bars), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). Neither has Duest shown cause for or prejudice from his default sufficient to overcome the procedural bar. Accordingly, the following claims are not cognizable on federal habeas review:

1. Claim IV, determined to be procedurally barred in Duest's motion for post-conviction relief for failure to raise it on direct appeal. *Duest,* 555 So.2d at 851.[13]

2. Claim VI, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. *Id.* at 853.[14]

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13 Although this court is barred from considering the substance of this claim, it will be considered *infra* as it relates to ineffective assistance of appellate counsel.

14 The court rejects Duest's argument that this claim was raised on direct appeal. On direct appeal, Duest challenged the sufficiency of the evidence to establish this aggravating circumstance, not whether the aggravator is unconsititutionally vague or was unconstitutionally applied. On direct appeal, the Florida Supreme Court rejected Duest's claim that insufficient evidence existed to establish this aggravating circumstance. *Duest,* 462 So.2d at 449-50. This court agrees with that conclusion.

3. Claim VII, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. *Id.*

4. Claim XII, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. *Id.*

5. Claim XVI, determined to be procedurally barred in Duest's motion for post-conviction relief for failure to raise it on direct appeal. *Id.* at 851.[15]

III. The *Brady* Claim (Claim I)

Duest claims that the prosecution improperly withheld exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). To prevail on these claims, Duest must show that the evidence was "material" either to his guilt or punishment, irrespective of the prosecutor's good or bad faith. *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. "The evidence is material only if there is reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S.

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15 As Duest recognizes in his petition, the Florida Supreme Court also treated this issue in the context of ineffective assistance of appellate counsel, finding that appellate counsel could not be deemed ineffective because trial counsel failed to properly preserve the issue by contemporaneous objection. *Duest,* 555 So.2d at 852. Duest has convinced the court that counsel contemporaneously objected to the evidence and thus that the issue of ineffective assistance of appellate counsel was a viable one. The court considers this ineffectiveness claim *infra.*

667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985).[16] The same materiality standard applies to the "no request," "general request," and "specific request" discovery violations outlined in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494.[17]

A. The Bus Ticket

The first purported *Brady* violation concerns a bus ticket dated April 5, 1982, which reflected travel from

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16 This standard in Justice Blackmun's opinion, joined by Justice O'Connor, received support from a concurring opinion joined by three Justices. Taken together, the two opinions establish a majority position on the Court for the proper standard to apply to the prosecution's failure to disclose exculpatory evidence. It is the same standard used for ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See generally*, W.LaFave & J. Israel, *Criminal Procedure* 19.5 at 162 (Supp. 1990) (discussing different opinions in *Bagley*).

17 It is unclear how these three categories of cases will be treated following *Bagley*. Justice Blackmun, joined by Justice O'Connor, indicated that "the reviewing court should assess...the totality of the circumstances" when determining whether a *Brady* violation occurred. *Bagley*, 473 U.S. at 683, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. However, Justice Blackmun recognized the particular problem represented by specific request cases: "[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Id.*, 473 U.S. at 682-83, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. Justice White, in an opinion joined by Chief Justice Burger and Justice Rehnquist, stated that there was "no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case" because the materiality standard was flexible and the cases to which it applied were on an "inherently fact-bound nature." *Id.* at 685, 105 S.Ct. at 3385, 87 L.Ed.2d at 496. *See* W. LaFave v. J. Israel, *supra*, at 163 (following *Bagley*, "[e]xactly what weight will be given to the presence of a specific request remains to be seen").

Boston to Fort Lauderdale by an unidentified holder. Duest argues that the ticket would have supported his alibi defense that he was in Massachusetts when Pope was killed. The ticket was contained in police files along with other items belonging to Duest. The ticket surfaced during the state trial court's evidentiary hearing on Duest's motion for post-conviction relief.

The state trial court denied post-conviction relief regarding the bus ticket. On appeal, the state supreme court also denied relief. Although the state supreme court stated that an inadvertent *Brady* violation occurred, it ruled that Duest had failed to demonstrate under *Bagley* that the bus ticket would have made any difference to this defense. *Duest,* 555 So.2d at 850.

Under 28 U.S.C. § 2254(d), this court accepts the state court's factual determination that an inadvertent *Brady* violation occurred. *Sumner v. Mata,* 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722, 731 (1981) (presumption applies to factual determinations of both state trial and appellate courts)[18] But having considered the bus ticket in light of *Bagley,* this court determines that no reasonable probability exists that the ticket would have been changed the outcome of Duest's case. The ticket does not show that

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18 Duest continues to dispute the finding that the prosecution's failure to disclose the ticket was inadvertent. However, the court presumes as correct the state court's factual finding that this *Brady* violation was inadvertent and thus need not consider Duest's argument that the state knowingly presented false and misleading evidence to the jury when it introduced testimony that a search of Trailways' records revealed Duest left no property at the bus station. Because the Florida court determined that a *Brady* violation occurred, this court need not consider whether the arresting officer was part of the prosecutorial team, so that his knowledge of possible *Brady* material would be imputed to the prosecutor. *See, e.g., Stano v. Dugger,* 901 F.2d 898, 906 (11th Cir. 1990) (Edmundson, J., concurring) (setting forth framework to aid district court in determining whether detective was part of prosecution team).

Duest was in Massachusetts on February 15, 1982, the day Pope was killed. Whether Duest was in Massachusetts 49 days later does not aid his alibi defense, as he could have fled Florida after the murder to return again in April. No defense witness testified that Duest was in Massachusetts continuously from February until April.

At most, the April ticket merely would corroborate the testimony of Duest's parents that they put him on a bus to Florida in April. No reasonable probability exists that an April bus ticket would have convinced the jury that Duest was innocent of the offense with which he was charged. At trial, the jury chose to disbelieve eleven of Duest's relatives and friends, who testified for the defense that they had seen Duest in Watertown, Massachusetts, on February 15, 1982, the date of the murder. Instead, the jury choose to believe seven prosecution witnesses who identified Duest as being in Fort Lauderdale on that date. Under *Bagley,* there is no reasonable possibility that an April bus ticket would have convinced the jury that Duest did not commit the February murder, when the jury did not believe a hardware store owner who produced a February receipt that purportedly showed that Duest was in Massachusetts when Pope was killed.

B. The Statements of Various Witnesses

Besides the bus ticket, Duest claims the prosecution committed discovery violations regarding the statements of various witnesses. The state trial court conducted no evidentiary hearing on these claims and Duest requests one in this court. Because the court concludes that Duest is not entitled to relief even if the facts he alleges are true, this court determines that these claims are without merit and that Duest is entitled to no evidentiary hearing. *Agan v.*

Dugger, 835 F.2d 1337, 1338 (11th Cir. 1987), *cert. denied,* 487 U.S. 1205, 108 S.Ct. 2846, 101 L.Ed.2d 884 (1988).

1. Possible Mitigating Evidence Offered by a Jail Inmate

Duest argues that the prosecution should have disclosed to the defense the statement of jail inmate Octavius Proia. Proia told police that Duest confessed to the crime and stated that he was going to use an alibi defense. Proia also told police that Duest stated that he stabbed Pope after he and Pope got into an argument. The prosecution declined to use Proia's statement in rebuttal during a guilt phase when defense counsel stated that he would withdraw as Duest's counsel if Proia testified because of a perceived conflict of interest. Transcript at 1332-34.[19]

Duest argues that the information that Proia provided to police was necessary mitigating evidence for the penalty phase of his trial, even if it would have helped to establish his guilt. Under *Brady* the prosecution is required to disclose evidence that is "both favorable to the accused and 'material either to guilt or to punishment...' " *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. Thus, the fact that Proia's testimony would have been inculpatory does not absolve the prosecution of the duty to disclose it if that testimony were truly material to the sentence that Duest received.

This court finds that the purportedly mitigating evidence in Proia's statement was not sufficient to create a reasonable probability of a different result in the penalty phase of

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19 Proia was represented by the public defender's office, which also represented Duest at trial. The prosecution did not list Proia as a witness, as he gave his statement to a police investigator nine days after Duest's trial began. After the prosecution declined to offer Proia's testimony in rebuttal, Duest's counsel did not contact Proia to determine the substance of his testimony. For further discussion, *see infra,* part XVI.A.2.

Duest's case. Proia would have presumably testified not only about the argument, but also that Duest told Proia that when he left the gay bar he intended to either kill Pope or do him bodily harm in order to rob him. Appendix to Petition for Writ of Habeas Corpus, Vol. I, #13 at 4. Proia's testimony would have included Duest's statement that he was careful not to touch anything at Pope's house and to wipe fingerprints from Pope's car. *Id.* Proia's testimony would also have included Duest's statement that when he left Pope was not yet dead, after being stabbed in the heart and lungs. *Id.* Finally, Proia's testimony would have included Duest's statement that he was concocting an alibi defense. Considering Proia's statement as a whole, its introduction would not have resulted in a different penalty for Duest.

2. Impeachment Evidence Regarding Various Witnesses

Duest also argues that he unconstitutionally was denied evidence that would have impeached the testimony of various prosecution witnesses. Such impeachment evidence is within the scope of the Brady rule under *Giglio v. United States,* 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108, 109 (1972). Duest raised these issues on December 17, 1989, in a supplement to his motion to vacate judgment and sentence. (Claim N). On January 4-5, 1990, at the hearing before the state judge, counsel for Duest made no mention of these claims, but confined his argument to the bus ticket issue. Transcript at 228-38. Duest neither produced nor requested the production of the alleged exculpatory statements he claimed the state withheld. Counsel for *Duest* never asked for a hearing on these issues. This argument was raised on appeal, but the Florida Supreme Court rejected it as being without merit. Duest, 555 So.2d at 851. This court agrees with that conclusion.

This court has considered the inadvertent *Brady* violation of withholding the bus ticket as to its impact on the penalty

phase of the case. The court finds that the omission of this evidence does not create "a reasonable doubt that did not otherwise exist"[20] with respect to the jury's decision at the guilt or the penalty phase of this case. *United States v. Agurs,* 427 U.S. at 104, 96 S.Ct. at 2397, 49 L.Ed.2d at 350; *Chaney v. Brown,* 730 F.2d 1334, 1340 (10th Cir. 1984), *cert. denied,* 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984).

IV. The *Johnson* Claim (Claim II)

Duest argues that his case should be remanded for a new sentencing hearing under *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), because one of his prior convictions was vacated after the death penalty was imposed. This prior Massachusetts conviction, for armed assault with intent to murder, constituted part of an aggravation circumstance used to impose the death penalty, as it was a prior conviction of a felony involving the use or threat of violence to a person. The vacated felony involved an incident in which Duest fired shots at two police officers who were pursuing him. Duest pled guilty to the offense, but his conviction was vacated by a Massachusetts appeals court after it determined that no evidence existed that Duest possessed the requisite specific intent to kill the pursuing officers.

As a threshold matter, the court must determine whether the Florida Supreme Court upheld Duest's death sentence, based in part on this vacated conviction, through a reweighing of aggravating and mitigating circumstances or under a harmless error review. Either method is permitted under the federal Constitution. *Clemons v. Mississippi,* ___,

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20 Duest's request for exculpatory evidence from the state encompassed, "[a]ny evidence favorable to the Defendant which is material to the issues of guilt or punishment." Record at 1709. The court construes this to be a "general request" under *Agurs.*

____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). However, the method employed by the Florida Supreme Court determines whether this court can consider Duest's claim under federal question review. If the Florida Supreme Court re-weighed the aggravating and mitigating factors, Duest's claim is procedurally barred. If the Florida Supreme Court conducted a harmless error review, this court must review its decision under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The parties are diametrically opposed as to which analysis the Florida Supreme Court employs.

After considering the Florida Supreme Court's language in *Duest*, a plethora of previous Florida decisions,[21] and characterizations of the Florida Supreme Court's analysis in United States Supreme Court decisions, the court concludes that Florida conducts a harmless error review in capital cases.[22] Thus, this issue is subject to federal habeas corpus review under *Chapman*.

As required by *Chapman*, the Florida Supreme Court applied the proper "beyond a reasonable doubt" standard

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21 *See, e.g., Freeman v. State*, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh [the aggravating and mitigating] circumstances"); *Hudson v. State*, 538 So.2d 829, 831 (Fla.) (It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances), *cert. denied*, ___ U.S. ___, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); *Atkins v. State*, 497 So.2d 1200, 1203 (Fla. 1986) ("It is not this Court's function to engage in a general *de novo* re-weighing of the circumstances"); *Bates v. State*, 465 So.2d 490, 493 (Fla. 1985) ("As a reviewing court, we do not reweight the evidence...We have consistently held that the weighing of aggravating circumstances is the trial judge's function"); *Lucas v. State*, 417 So.2d 250, 251 (Fla. 1982) ("This Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'").

22 *Clemmons*, ___, U.S. at ___, 110 S.Ct. at 1450, 108 L.Ed.2d at 741 (Florida Supreme Court does "not apply its harmless error analysis in an automatic and mechanical fashion") (quoting *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)).

when conducting its harmless error analysis. *Duest,* 555 So.2d at 851; *see Clemmons,* ___ U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. First, the court recognized that this case is distinguishable from *Johnson,* because even considering the vacated conviction, Duest still had an undisturbed conviction for armed robbery. *Duest,* 555 So.2d at 851. Because of that remaining conviction, "a basis still existed for the aggravating circumstance of prior conviction of a violent felony." *Id.* (citing *Bundy v. State,* 538 So.2d 445 (Fla. 1989); *Daugherty v. State,* 533 So.2d 287 (Fla.), *cert. denied,* 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988)). Further, the supreme court noted that three other valid aggravating circumstances applied to Duest's sentence and concluded that "even if we were to find that one or two of the aggravating circumstances found by the trial judge, [sic] was inapplicable, it would still be appropriate to maintain the death penalty." *Id.* (quoting *Duest v. State,* 462 So.2d at 450).

Considering the foregoing, it appears that the Florida Supreme Court concluded that it was beyond a reasonable doubt that Duest's sentence was unaffected by consideration of the prior Massachusetts conviction, which was later vacated because the aggravating circumstance of a prior conviction of a violent felony still existed and was thus properly considered in the balance of aggravating and mitigating circumstances. Under *Clemons,* this is a proper approach to the harmless error question. *Clemons,* ___, U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. In contrast to *Clemons,* the record supports the Florida Supreme Court's conclusion that the error in Duest's case was harmless. Here, the state did not emphasize repeatedly and argue the conviction that was later vacated to place little emphasis on the other violent felony conviction that remained. *See Clemons,* ___ U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741; *see also Johnson v. Mississippi,* 511 So.2d 1333, 1338 (Miss. 1987) (state repeatedly argued invalidated aggravating circumstance), *reversed,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d

575 (1988). Instead, the trial judge merely read both indictments to the jurors and informed them that convictions had been rendered on those indictments. Supplemental Brief at 2. Having reviewed the record, the court concludes that the consideration of the vacated conviction was harmless error that does not require remand for a new sentencing hearing.

V. Victim Impact Evidence and Prosecutorial Comment (Claim III)

Duest argues that he is entitled to habeas relief because the prosecution unconstitutionally introduced prejudicial victim impact evidence at the sentencing phase of the trial, in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

Both *Booth* and *Gathers* espouse the principle that the introduction of victim impact evidence in capital cases violates the eighth amendment, because it allows the sentence to rely on evidence that the defendant was unaware of at the time of the crime and that did not factor into the decision to kill, and it thus unrelated to the defendant's personal responsibility and moral guilt. *Gathers*, ___ U.S. at ___, 109 S.Ct. at 2210, 104 L.Ed.2d at 882-83. In *Booth*, the Supreme Court concluded that the statutorily mandated introduction of victim impact statements and descriptions of the victim's personal characteristics during the sentencing phase of a capital case violates the eighth amendment. *Booth*, 482 U.S. at 509, 107 S.Ct. at 2536, 96 L.Ed.2d at 452. Although the Court in *Booth* disapproved of victim impact statements, it recognized that the type of information included in such statements might be relevant in certain contexts, such as if it related directly to the circumstances of the crime or would rebut an argument offered by the defendant. *Id.* at 507 n.10, 107 S.Ct. at 2535 n.10, 96 L.Ed.2d at 451 n.10. In *Gathers*, the Court ruled that the eighth amendment was violated

when, during the sentencing arguments, the prosecutor read from a religious prayer that the victim was carrying when he was killed and referred to the fact that the victim also carried with him a voter registration card. *Gathers*, U.S. at ___, 109 S.Ct. at 2210-11, 104 L.Ed.2d at 883. The Court rejected the state's argument that the contents of these items were relevant to the crime, although it acknowledged that the fact that these items were scattered at the crimes scene indicated that the defendant was looking for valuables to steal, and was "thus a proper subject for comment." *Id.*

Duest's main argument under *Booth* and *Gathers* concerns the prosecution's introduction at trial of a photograph of Pope's dresser, on which rested a picture of purported members of Pope's family. The Florida Supreme Court rejected Duest's victim impact claim while considering an ineffective appellate assistance claim, concluding that "[t]he photograph of the dresser appears to have been relevant to the case, and the fact that a picture of persons who may have been the victim's family appeared in the photograph injected minimal victim impact evidence into the trial." *Duest*, 555 So.2d at 852.

This court also determines that the eighth amendment was not violated by introduction of the challenged photograph during the guilt phase of Duest's trial. The photograph of Pope's dresser was relevant on another ground; that is, to show how the room was laid out and what items were on the dresser. Furthermore, it was never established that those pictured in the photograph actually were Pope's family. Transcript at 460. The prosecutor in this case did not argue to the jury that the photograph represented Pope's family, thus arguing the contents of the evidence to show victim impact, in contrast to the prosecutor in *Gathers*, who argued the contents of the victim's belongings to describe

him as a simpleminded religious person who was a good citizen.

Besides the photograph, Duest argues that eight amendment violations occurred when the state presented victim impact evidence to the jury and judge, in the prosecutor's closing argument at the penalty stage, and in statements from the victim's family included in the presentence investigation report that was submitted to the sentencing judge. The court rejects the state's argument that these remaining *Booth* claims are procedurally barred, as the Florida Supreme Court clearly rejected this claim on its merits. *Duest,* 555 So.2d at 851 ("We reject as without merit the following additional claim[]:...The judge and the jury improperly relied upon victim impact evidence").

As these victim impact claims are thus cognizable on federal habeas review, the court considers the substance of the statements to which petitioner objects. In closing argument before Duest's sentencing jury, the prosecutor stated that the victim was "a young 64" who was "[e]njoying his life." While the prosecutor acknowledged that the victim may have been a homosexual, he told the jury that he believed this would not affect their decision, because the victim "had just as much of a right to be the way he was as anybody else has to be the way they are." The prosecutor then went on to state that "[o]f course, [the victim] had a family, too." Statements of family members, specifically the victim's daughter and son, were included in the presentence investigation report given to the sentencing judge. Transcript at 1811-12.

The court concludes that neither the prosecutor's argument nor the inclusion of family statements in the presentence report constitute an eighth amendment violation within the scope of *Booth* and *Gathers. See also Bertolotti v. Dugger,* 883 F.2d 1503, 1528 (11th Cir. 1989). The prosecutor's

statements describing Pope are distinguishable from those in *Gathers,* because they include facts that were known to Duest when Pope was killed and were intended to discourage the jurors from treating Duest leniently because of a homophobic reaction to the circumstances of the crime. These statements differ materiality from those disallowed in *Gathers* and in *Jackson v. Dugger,* 547 So.2d 1197, 1198 (Fla. 1989) (only prosecution evidence during penalty stage was sheriff's testimony about murdered officer's good reputation among peers and impact of officer's death on peers' morale and ability to carry on duties). Similarly, the inclusion of two family members' statements in the presentence report presented only to the sentencing judge is distinguishable from the situation in *Booth,* in which a Maryland jury was required by statute to consider victim impact statements. As required by Florida Law, the sentencing judge delineated the aggravating and mitigating circumstances that figured into her consideration of the appropriate sentence, which did no include reference to the impact of the crime on Pope's family. The mere fact that limited victim impact statements were included in the presentence report presented to the judge, who disregarded such statements in weighing the relevant aggravating and mitigating circumstances, does not constitute a violation of the eighth amendment under *Booth.*

VI. "Especially Heinous, Atrocious, and Cruel" (Claim V)

Duest argues that his sentencing jury was improperly instructed on the aggravating circumstance "especially heinous, atrocious, or cruel" under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988), and *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

The Supreme Court approved Florida's use of this aggravating circumstance in conjunction with a limiting instruction in *Proffitt v. Florida,* 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976). The proper limiting instruction informs the jury that this aggravator only applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973), *cert.denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In Duest's case, no limiting instruction was given. Instead, the jury was simply instructed that "[t]he crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." Transcript at 1626.

On direct appeal, Duest argued that Pope's murder was not particularly heinous, atrocious, or cruel, in effect challenging whether evidence was sufficient to establish this aggravating circumstance. The Florida Supreme Court disagreed with Duest:

> The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

Duest, 462 So.2d at 449. The court analogized Duest's case to *Morgan v. State,* 415 So.2d 6 (Fla.), *cert. denied,* 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982), in which the aggravating circumstance was applied to a death caused by one of more than ten stab wounds.

In his state habeas petition, Duest claimed to receive ineffective assistance of appellate counsel for failure to raise this claim on direct appeal. The Florida Supreme Court found appellate counsel to be adequate because trial counsel

reserve the issue for appeal. *Duest,* 555 So.2d at 852.

Thus, significantly, Duest's counsel failed to make a contemporaneous objection to the failure to give a limiting instruction for this aggravator or to challenge the instruction given on direct appeal. If Duest had raised this claim as a substantive matter in his Rule 3.850 motion or in his state habeas petition, the Florida Supreme Court would have determined that it was procedurally barred. If a state court would apply a procedural bar if had been given the opportunity to do so, a federal court similarly should apply a procedural bar on habeas review. *Teague v. Lane,* 489 U.S. 288, ___, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334, 347-48 (1989) (plain statement rule announced in *Harris v. Reed* does not apply to claim not presented to state court). Accordingly, this court finds that this claim is procedurally barred from habeas review. Duest has not shown cause and prejudice or a miscarriage of justice resulting from application of this bar.

VIII. Burden-shifting at Sentencing (Claim VIII)

Duest argues that the penalty phase jury instructions impermissibly shifted the burden of persuasion to him and that the trial judge employed the same impermissible standard in imposing the death sentence. Specially, Duest objects to instructions that the jury was to determine whether the mitigation presented outweighed the aggravation, because the existence of one aggravating factor would create a presumption that the death penalty was appropriate.

The sentencing jury in Duest's case was instructed to determine "first, whether sufficient aggravating circumstances exist that would not justify the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any," and to decide whether any aggravating circumstances had

been proven beyond a reasonable doubt. Transcript at 1572, 1590. *See also* Transcript at 1626-27.

The court finds that these instructions mirrored the language in Florida's capital sentencing statute. *See* Fla. Stat. § 921.141(2)(a)(b). Florida's capital sentencing scheme, including this particular language, was approved by the Supreme Court in *Proffitt v. Florida,* 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926 ("directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones"). There is no merit to Duest's claim that the sentencing instructions constituted impermissible burden-shifting.

VIII. Consideration of Sympathy at Sentencing (Claim IX)

Duest argues that the trial judge improperly instructed the jurors that they could not consider sympathy toward Duest when determining what their sentence recommendation would be, under the authority of *California v. Brown,* 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

However, *Brown* does not stand for the blanket proposition that all antisympathy instructions are impermissible at sentencing. *Saffle v. Parks,* ___U.S.___, ___, 110 S.Ct. 1257, 1263, 108 L.Ed.2d 415, 428 (1990). Furthermore, if *Brown* were considered a new rule, the Supreme Court has ruled that it would not apply retroactively on collateral review. *Id.,* ___U.S. at ___, 110 S.Ct. at 1263-64, 108 L.Ed.2d at 428-29. Because *Brown* was decided approximately two years after Duest's conviction became final, *Brown* is inapplicable to his case and thus this claim must fail.

IX. The *Caldwell* Claim (Claim X)

Duest argues that the sentencing instructions to the jury improperly diminished the jurors' sense of responsibility to his death sentence, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Following *Sawyer v. Smith*, ___U.S.___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), Duest cannot use *Caldwell* to attack his conviction and sentence on federal habeas corpus. In *Sawyer*, the Supreme Court held that *Caldwell* was a new rule for purposes of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, and thus it could not be used by federal habeas petitioners whose convictions became final before it was decided. *Sawyer*, ___U.S. at ___, 110 S.Ct. at 2827, 111 L.Ed.2d at 206. As *Caldwell* was decided June 11, 1985, and Duest's conviction became final January 10, 1985, his *Caldwell* claim must fail.

X. Nonstatutory Aggravating Factors (Claim XI)

Duest argues that the death penalty was arbitrarily and capriciously imposed because the prosecution introduced evidence of nonstatutory aggravating factors, such as the fact that Duest is homosexual and never served in the military. Under Florida law, aggravating circumstances are limited to those enumerated in the statute. Fla.Stat. § 921.141(5).

The Florida Supreme Court addressed this claim as one for ineffective assistance of appellate counsel, concluding that appellate counsel could not be deemed ineffective for failing to raise on appeal an issue that trial counsel had not preserved. *Duest*, 555 So.2d at 852.

Because this claim was not raised on direct appeal as a substantive matter, had Duest raised it in his Rule 3.850 motion or in his state habeas petition, the Florida Supreme Court would have determined that it was procedurally barred. Under these circumstances, this federal court

similarly should apply a procedural bar on habeas review. *Teague,* 489 U.S. at ___, 109 S.Ct. at 1068-69, 103 L.Ed.2d at 347-48. Because Duest has not shown cause and prejudice regarding his procedural default, the court finds that this claim is not cognizable on federal habeas review.

XI. Sufficiency of the Evidence (Claim XXII)

Duest argues that his conviction violated due process because the evidence was insufficient to support a finding of first-degree murder under a premeditation theory, one of the two bases under which the jury could have convicted him of first degree murder.[23]

This claim was considered and rejected by the Florida Supreme Court on direct appeal:

> Premeditation, like other factual circumstances, may be established by circumstantial evidence. *Adams v. State,* 412 So.2d 850 (Fla.), *cert. denied,* 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence. *Peek v. State,* 395 So.2d 492 (Fla. 1980), *cert. denied,* 451 U.S. 964, 101 S.Ct.2036, 68 L.Ed.2d 342 (1981). The record reflects that defendants had stated he gets his money by "rolling gay guys" and that he intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driv-

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23 Duest does not challenge the sufficiency of the evidence to establish felony murder, the other possible basis for the jury's conviction.

> ing the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car which was being driven by defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a s even inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder.

Duest, 462 So.2d at 448-449. Like the Florida Supreme Court, this court finds no merit to this claim.

XII. Race as a Factor in Sentencing (Claim XXIII).

Duest argues that Florida imposes the death penalty on the basis of impermissible, arbitrary, and discriminatory factors, including race, in violation of the eighth and fourteenth amendments. Duest devotes some 39 pages of his petition to this argument, quoting extensively from studies by Professors Gross and Mauro. This claim, based on the same studies, was rejected in *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 96 L.Ed.2d 262 (1987), which collateral counsel does not bother to cite.

XIII. Full and Fair State Court Forum (Claim XXIV)

Duest argues that he was denied a full and fair forum in state court, because the trial judge refused to disqualify herself from presiding over his Rule 3.850 proceedings. Duest argues that disqualification was required because the judge was prejudiced against him. As evidence of such prejudice, Duest points to a letter written by the trial judge in response to an inquiry from the Florida Parole and

Probation Commission after Duest's direct appeal was rejected. In that letter, the trial judge stated that "Mr. Duest is still lying to the Court and still trying to thwart whatever judicial process that remain."

On appeal of denial of his Rule 3.850 motion, the Florida Supreme Court found this claim to be without merit. *Duest,* 555 So.2d at 851. The Florida Supreme Court's interpretation of Florida law as applied to Duest is not reviewable in a federal habeas corpus proceeding. *Garcia v. Perringer,* 878 F.2d 360, 362 (11th Cir. 1989). Duest has not demonstrated that he failed to receive a full, fair, and adequate hearing in state court, so as rebut the presumption of regularity given to state court proceedings on federal habeas review. 28 U.S.C. § 2254(d)(6).

XV. Instruction Regarding Life Recommendation (Claim XXV)

Duest argues that his capital sentencing proceedings were robbed of any indicia of reliability when the trial judge erroneously instructed the jury that a majority had to recommend life imprisonment. The jury recommended the death penalty by a majority of 7-5.

Duest's counsel did not object to this instruction at trial and did not raise it on direct appeal. Thus, were this issue before the Florida Supreme Court, it would be procedurally barred. Under the rule of *Wainwright v.Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), this clam is cognizable on federal habeas review only if Duest demonstrated cause and prejudice for his default. *See Ford v. Strickland,* 696 F.2d 804, 812, 822 (11th Cir.), *cert. denied,* 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); *see Engle v. Isaac,* 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783, 805 (1982) (challenge to jury instructions barred from federal habeas

review because of petitioner's failure to comply with Ohio contemporaneous review).

Duest has not shown cause for trial counsel's failure to contemporaneously object to this instruction at trial. Furthermore, there is no evidence that Duest was prejudiced by the erroneous instruction. In the context of jury instructions, "prejudice means 'not merely that the errors at [the petitioner's] trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage.'" *Ford,* 696 F.2d at 822 (Godbold, J., concurring in part and dissenting in part) (quoting *United States v.Frady,* 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 1982) (emphasis in original)). Duest cannot show such prejudice, because he can do so more than raise the possibility that the jury might have deadlocked on the issue of death or life imprisonment. There is nothing in the record to show that the jury deadlocked at 6-6, which would have resulted in a life recommendation. Without such record evidence or a proffer from Duest, no prejudice has been shown. *Henry v. Wainwright,* 743 F.2d 761, 763 (11th.Cir. 1984) (although instructions at capital sentencing did not inform jurors of consequences of tie vote, no prejudice when seven jurors voted for death penalty).

XV. The *Strickland* Claims (Claims VIII, XI, XIII, XIV, XV, XVII, XVIII, XIX, XX, XXI)

Duest argues that he received ineffective assistance of counsel, both at trial and on direct appeal. Some of these ineffective assistance claims are raised separately and some are included within other substantive claims.

The standard for reviewing ineffective assistance claims was set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on such a claim, Duest must show that his counsel's performance was

below an objective standard of reasonableness, considered from his counsel's perspective at the time of the conduct. *Id.* at 688-89, 104 S.Ct. at 2064-65, 80 L.Ed.2d at 694. Duest must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The same standard applies to both the guilt and penalty phases of a capital case. *Funchess v. Wainwright,* 772 F.2d 683, 688 (11th. Cir. 1985), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1242, 89 L.Ed.2d 349 (1986). The two components of an ineffective assistance claim need not be considered in any particular order. In fact, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...that course should be followed." *Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.

Questions of ineffective assistance of counsel or of conflict of interest are mixed questions of law and fact. *Strickland,* 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700 (ineffective assistance); *Cuyler v.Sullivan,* 446 U.S. 335, 341, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333, 334 (1980) (conflict of interest); *Lusk v. Dugger,* 890 F.2d 332, 336 (11th. Cir. 1989) (ineffective assistance), *cert. denied,* ___U.S.___,110 S.Ct. 3297, 111 L.Ed.2d 805 (1990); *Lightbourne v. Dugger,* 829 F.2d 1012, 1023 (11th. Cir. 1987); (conflict of interest), *cert. denied,* 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 345 (1988). State court findings made in deciding such claims are subject to the deference requirement of section 2254(d), but both prongs of the *Strickland* inquiry are mixed questions of law and fact. *Strickland,* 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

The court first considers Duest's claims of ineffective assistance of trial counsel and second those claims dealing with ineffective assistance of appellate counsel.

A. Ineffective Assistance of appellate counsel.

1. Failure to Object to Impermissible Burden-Shifting During Penalty Phase (Claim VIII)

Duest argued that he received ineffective assistance because trial counsel did not object to jury instructions that impermissibly shifted the burden of proof to Duest at sentencing.

On review of Duest's state habeas petition, the Florida Supreme Court considered this issue as one involving ineffective assistance of appellate counsel. The court determined that appellate counsel could not be deemed ineffective for failing to raise a claim that trial counsel had not preserved by objection. *Duest,* 855 So.2d at 852; *see Francois v. Wainwright,* 741 F.2d 1275, 1285-86 (11th. Cir. 1984) (given state procedural bar, appellate counsel could reasonably conclude on appeal that Florida Supreme Court would not address issue on merits).

In this federal habeas petition, Duest also raised this burden-shifting claim as a substantive matter, a claim that this court has rejected. Because this court has determined that no impermissible burden-shifting occurred, Duest was not prejudiced by his trial counsel's failure to object to the challenged jury instructions.

2. Failure to Pursue Possible Mitigating Evidence Because of Conflict of Interest (Claim XIII)

Duest argues that a *Strickland* violation occurred when trial counsel failed to depose Octavius Proia, a jail inmate from Pennsylvania who could have provided mitigating evidence at the penalty phase. Specifically, Duest argues that the failure resulted from a conflict of interest, in that the public defender's office represented both Duest and Proia.

Proia was in jail for a short time following his arrest in Florida for a probation violation, arising from an earlier forgery conviction, when he contacted the state attorney's office to provide information about Duest's case. Transcript at 1291. In a statement provided nine days after Duest's trial began, Proia stated that Duest told him he had witnesses from Massachusetts who would lie to construct his alibi defense, including an auto parts store employee who would produce a phony receipt to show Duest was in Massachusetts when Pope was murdered.

Besides this testimony, which would have been inculpatory during the guilt phase of Duest's trial, Proia also stated that Duest said he had an argument with Pope before the stabbing occurred. Appendix to Petition for Writ of Habeas Corpus, Vol. 4, Tab 13 at 3. According to Duest, if this testimony had been presented in mitigation, it would have rebutted two aggravating circumstances submitted to the jury: that the murder was cold, calculated, and premeditated; and that it was committed for pecuniary gain while in the course of a robbery.[24]

It is clear that the right to effective assistance encompasses the right to representation free from actual conflict. *Lightbourne v. Dugger,* 829 F.2d at 1023 (citing, *inter alia, Cuyler v. Sullivan,* 446 U.S. at 349, 100 S.Ct. at 1719, 64 L.Ed.2d at 347. Under the two-part test established in *Cuyler,* Duest must show that an actual conflict existed and that the conflict had an adverse effect on his counsel's representation. *Id.* at 1023. If this two-part test is met, prejudice is presumed and Duest is entitled to relief. *Id.*

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24 Although pecuniary gain and commission of murder while in the course of a felony are two distinct aggravating circumstances inthe Florida statutes, the state trial court judge considered them as one circumstance when she weighed the aggravating and mitigating circumstances before she determined that death was the appropriate sentence for Duest.

The threshold question before the court is whether an actual conflict of interest existed in Duest's case. *See id.* ("possible, speculative or merely hypothetical conflict does not suffice"). According to Duest, both parties and the state trial court recognized that an actual conflict existed because both Duest and Proia were represented by the same public defender's office. Proia had a different assistant public defender than Duest and had not previously used the public defender's office. Transcript at 1291. Yet after the potential conflict was discovered, Proia's public defender withdrew from his case. Transcript at 1296, 1333. However, the parties disagreed as to whether that withdrawal cured the conflict. *Id.* Eventually, the prosecution agreed not to call Proia when defense counsel stated that he would withdraw from the case and file a motion for mistrial if Proia testified. Transcript at 1332-34.

From the foregoing, the court concludes that the parties and trial court recognized a conflict if Proia were to testify during the guilt phase of Duest's case. During the guilt phase, a potential conflict existed; however, that potentiality was prevented from ripening into an actuality when the prosecutor agreed not to put Proia on the witness stand. The potential conflict allowed Duest's counsel to block Proia's testimony, which would have irretrievably damaged Duest's alibi defense.

The fact that the parties and the trial judge recognized a conflict of interest in terms of the guilt phase does not mean that an actual conflict of interest existed in terms of sentencing. "An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." *Porter v. Wainwright,* 805 F.2d 930, 939 (11th Cir. 1986), *cert. denied,* 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). To show an actual conflict, Duest must

show that his trial counsel " 'made a choice between possible alternative courses of action such as eliciting (or failing to elicit) evidence helpful to [Duest] but harmful to [Proia]. If he did not make such a choice, the conflict remained hypothetical.' " *United States v. Mers,* 701 F.2d 1321, 1328 (11th. Cir.) (quoting Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants,* 68 J.Crim.L. & Criminology, 226, 232 (1977)), *cert. denied,* 464 U.S. 991, 104 S.Ct. 481, 482, 78 L.Ed.2d 679 (1983).

In this case, Duest's trial counsel had no conflict of interest regarding Proia's statement for purposes of the penalty stage of the proceedings. Before the prosecutor agreed not to use Proia's testimony, he stated on the record that Proia had given a sworn statement. Transcript at 1334. Duest's counsel could have requested that statement, and the mitigating evidence therein, without having to choose between Duest and Proia's interests. Without showing that such a choice was necessary, Duest has not proved that an actual conflict of interest existed. *Stevenson v. Newsome,* 774 F.2d 1558, 1562 (11th. Cir. 1985), *cert. denied,* 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

In any event, even if an actual conflict existed, Duest has failed to show that such conflict prejudiced him. Even if Proia would have provided testimony that the stabbing occurred after an argument, Proia also would have testified that Duest was relying on Massachusetts witnesses who would lie to construct his alibi defense. Had the jurors heard such testimony after the defense steadfastly maintained Duest's innocence, both counsel and Duest would have suffered serious credibility problems with the jurors and the judge, which would have made them less inclined to believe other mitigating evidence presented. *Smith v. Dugger,* 840 F.2d 787, 795 (11th. Cir. 1988), *reh'g denied,* 888 F.2d 94 (11th. Cir. 1989), *cert. denied,* ___U.S.___, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). Furthermore, Proia's testimony

would have included Duest's statement on his intentions when going to the bar and the methodical manner in which he executed the stabbing, which would have supported other aggravating circumstances.

3. Failure to Suppress Duest's Statements Claim (XIV)

Duest argues that he received ineffective assistance when counsel failed to suppress testimony that improperly commented on his silence in violation of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Duest also argues that the sixth amendment was violated when the prosecution used testimony in which a witness stated that he overheard Duest tell counsel that "I never committed a murder before."

As to Duest's claim that a sheriff's detective improperly commented on his silence, the record totally refutes such a claim. Detective Feltgen interviewed Duest at the courthouse and immediately advised Duest of his *Miranda* rights. Transcript at 876. Duest waived these rights and gave a full statement to Feltgen which was exculpatory in nature. Transcript at 877-878. On cross-examination, defense counsel asked whether this statement was recorded, and the following transpired:

> Q. (Defense counsel): And there was no tape or anything like that going?
>
> A. (Detective Feltgen): There was no tape going at that time.
>
> Q. That's sometimes used, is it not?
>
> A. If the defendant is willing to give a taped statement, a tape is used.
>
> Q. You didn't ask him, though, did you?
>
> A. Yes, I did.

Q. And he said no?

A. He refused to give any type of statement.

Transcript at 893.

In the context of the questioning, it is clear that Duest refused to permit a tape recording of his statement, but he never refused to give a statement. Duest's claim of a *Doyle* violation considerably exceeds the reach of that decision, which dealt with a trial where the prosecutor impeached the defendant's testimony explaining the circumstances of the case with comments on the defendant's failure to tell the same story at the time of his arrest. Defense counsel in this case was probing the detective's testimony to determine if there was a tape of Duest's statement in the hope that he might find some inconsistency. This court concludes that Duest has failed to establish a *Doyle* violation.

With regard to the testimony of Rene Robles, who conducted the lineup identification, it appears that Duest made a voluntary statement which was not in response to any interrogation from Robles. There is nothing in the record to indicate that Duest's counsel was present at the time this remark was made. Robles testified that Duest was speaking to Robles. Accordingly, no sixth amendment violation has been established.

Since an objection by trial counsel would have been unavailing as to both incidents claimed herein, the court concludes that under *Strickland* guidelines, trial counsel was not ineffective for failing to object.

4. Misinformation Regarding Burden of Proof of Alibi (Claim XVII)

Duest argues that defense counsel unreasonably and prejudicially misinformed the jury as to the burden of proof on his alibi defense. During jury voir dire, defense counsel

stated to prospective jurors that "we just have to raise a reasonable doubt" as to Duest's whereabouts on the day of the murder. Transcript at 366.

The Florida Supreme Court concluded that there was no merit to this claim. *Duest,* 555 So.2d at 851. This court agreed and concludes that Duest can show no prejudice from defense counsel's statements so as to amount to ineffective assistance. Before their deliberations, the jurors were properly instructed that the prosecution bore the burden of proving beyond a reasonable doubt each element of the offense charged. Transcript at 1518-19. The jury was presented with conflicting evidence about Duest's whereabouts on the day of the murder and there was substantial evidence that Duest was at the scene of the crime. The jury determined that this evidence showed beyond a reasonable doubt that Duest was guilty of the crime with which he was charged.

5. Failure to Conduct Independent Investigation and Present Compelling Mitigation at Penalty Phase (Claim XVIII)

Duest argues that at sentencing, trial counsel violated the rule enunciated in *Strickland* by failing to conduct an independent investigation regarding possibly mitigating evidence that could have been presented at sentencing. The Florida Supreme Court dismissed this claim as without merit. *Duest,* 555 So.2d at 851.

Duest's attorney was required to conduct a "reasonable investigation" into possible mitigating evidence. *Smith,* 840 F.2d at 795. Duest claims that his trial attorney failed to conduct a reasonable investigation by not obtaining his school, hospital, and prison records, in part to present them as background documentation to the mental health experts who examined Duest before sentencing. Duest claims that such investigation and presentation would have bolstered the mitigating evidence he did present at sentencing.

The trial court conducted an evidentiary hearing on this claim wherein it was established that trial counsel did conduct an adequate investigation into the defendants' mental health, family relationships and educational background. Trial counsel was dependent upon the defendant and his family for leads as to relevant data. Trial counsel retained Dr. Patsy Cerous-Livingston to interview the defendant and to prepare a report. The information included in the report was not used at the penalty phase as trial counsel made a conscious decision to exclude it. The report would have opened the door to considerable damaging evidence that would have prejudiced the defendant. Transcript at 155, 157, 175, 176. Included in the prejudicial information was the following: the defendant committed 28 prior felonies, had prior escapes from prison, was found with a knife in prison, had homosexual tendencies, would probably escape again if given the opportunity, indicated that he never acted inappropriately in the commission of any crime, and is inclined to take what he wants rather than being able to delay gratification.

Collateral counsel for the defendant hired Dr. Patricia Fleming to interview the defendant and to examine records. She came to a somewhat different conclusion than Dr. Ceros-Livingston, but her report also included some of the same negative observations that Dr. Ceros-Livingston's report included.

This court has reviewed the entire hearing transcript on this issue and agrees with the state court judge that Duest has failed to establish his ineffective assistance of counsel claim. Counsel made strategy decisions which are protected are under *Strickland*.

6. Ineffective Assistance of Trial Counsel in Failure to Object to Prosecutorial Conduct and Statements (Claim XIX)

Duest argues that he received ineffective assistance when counsel failed to object to a number of comments by the prosecutor both in his opening statement and closing argument, which Duest contends denied him a fair trial.

On direct appeal, one of Duest's claims concerned whether the trial court properly denied a motion for mistrial based on alleged prosecutorial misconduct. Apparently, the Florida Supreme Court did not address this claim in denying Duest's direct appeal, except to the extent that it considered a claim that the prosecutor allegedly insulted defense counsel during cross-examination of a witness. *Duest,* 462 So.2d at 448. If a claim is raised on direct appeal, even if not addressed directly by the state supreme court, it is considered ruled on. Such a claim is then foreclosed from state collateral attack but available in federal habeas petition as an exhausted claim. *Smith,* 840 F.2d at 791. Thus, the court will treat this claim as an exhausted claim.

Duest complains about the failure of trial counsel to object to a number of remarks made by the prosecutor in his opening statement, during trial, and in closing argument. Had these comments been preserved for appeal and raised on appeal, they would have been disposed of quickly as either no error or at best harmless error. Duest has failed to establish any basis for relief from this court.

Improper prosecutorial comment is not a basis for habeas relief unless the resulting prejudice amounts to a denial of due process. *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

7. Failure to Object to Trial reliance on Hearsay Statements Presentence Investigation Report, Ex Parte Communications, and Manner of Conducting Sentencing Hearing (Claim XX)

In his federal habeas petition, Duest raises this claim both as a substantive matter and as a claim for ineffective assistance of trial counsel.

The Florida capital sentencing scheme allows presentation of hearsay evidence relevant to the crime and the defendant's character, provided the defendant has the opportunity to rebut any hearsay statement. Fla. Stat. § 921.141(1); *Dragovich v. State,* 492 So.2d 350 (1986) (hearsay evidence that defendant had reputation as arsonist not subject to fair rebuttal and thus inadmissible in penalty phase). Duest presents numerous unfocused allegations of impropriety in the presentence investigation and at the sentencing hearing. The court has reviewed these allegations and finds them wholly without merit.

8. Conflict of Interest Regarding Duest's Alibi Witnesses (Claim XXI)

Duest argues that his alibi witnesses were intimidated by the prosecutor when he advised them in depositions that they should confer with counsel before answering questions about Duest's whereabouts in February, when Duest was an escapee from a Massachusetts prison. The prosecutor properly alerted the witnesses that it might be a crime in Massachusetts to know the whereabouts of an escaped prisoner and not reveal this knowledge to proper authorities. Defense counsel also urged the witnesses to consider the implications of their testimony.

The Florida Supreme Court rejected as without merit Duest's claim that he was denied effective assistance in this alleged conflict of interest. *Duest,* 855 So.2d at 851. This

court also finds Duest's claim to be without merit. Both the prosecutor and Duest's attorney acted in an ethical manner. Neither gave legal advice to these witnesses. They merely alerted the witnesses to potential legal problems and urged them to obtain independent legal advice. Defense counsel's conduct did not constitute deficient performance under *Strickland.*

B. Ineffective Assistance of Counsel

The ineffective assistance standard for appellate counsel requires that Duest establish that counsel's failure to raise an issue on appeal was not a deliberate tactical judgment or based on a good faith evaluation of an issue's merit. *Smith v. Murray,* 477 U.S. 527, 535-36, 106 S.Ct. 2661, 2666-67, 91 L.Ed.2d 434, 445 (1986); *Francois v. Wainwright,* 741 F.2d 1275, 1285-86 (11th Cir. 1984). If the decision to abandon the issue on appeal was deliberate, ineffective assistance may still exist by "even an isolated error of counsel...if that error is sufficiently egregious and prejudicial." *Murray v. Carrier,* 477 U.S. at 496, 106 S.Ct. at 2649, 91 L.Ed.2d at 413.

1. Failure to Raise Evidence of Flight (Claim IV)

Duest argues that appellate counsel was ineffective for failing to argue that the trial court erred in permitting, over objection, evidence that Duest tried to escape while he was in police custody. The Florida Supreme Court considered this claim in its habeas review:

> Duest was contacted by the Fort Lauderdale police on April 18, 1982, and advised that he was a suspect in the homicide. He voluntarily went to the police station for questioning. At this time, Duest was known to the police as Robert Brigida. Duest was questioned by a detective about the

> murder. It was then discovered that misdemeanor traffic warrants were pending in Massachusetts against Robert Brigida, and Duest was arrested on these warrants. Thereafter, when the detective momentarily left the room and returned, Duest was missing. He was found several hours later at a Fort Lauderdale apartment.

Duest, 555 So.2d at 852. Considering these facts, the Florida Supreme Court reached the following legal conclusion:

> Duest's appellate counsel cannot be deemed ineffective for failing to argue this point. Evidence in this case raised a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending Massachusetts charges. Consistent with the rationale of *Bundy v. State,* 471 So.2d 9 (Fla. 1985), *cert. denied,* 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), the jury could properly infer such circumstantial evidence to be evident of guilt. The argument would have been unavailing had been raised on direct appeal.

Duest, 555 So.2d at 852.

This court determines that *Strickland* does not require that Duest's petition be granted because of appellate counsel's failure to argue that the trial court erred in admitting evidence of flight. As evidence of flight is circumstantial evidence of guilt in Florida under *Bundy,* Duest's appellate counsel could have concluded, in good faith, that the issue did not merit appeal. Thus, Duest cannot show that he was prejudiced as a result of appellate counsel's failure to raise this claim.

2. Ineffective Assistance of Counsel on Direct Appeal (Claim XV).

Duest argues that his counsel on direct appeal was ineffective in failing to raise what appears in his petition as Claims IV, VII, VIII, IX, X, XI, XII, XIV, XVI, XX, and XXV. The court addressed ineffective assistance arguments concerning Claims IV, XIV, and XX in previous subsections, concluding that Duest had not shown under prejudice under *Strickland* so as to prevail on these claims. This court also rejected Claims VIII, IX, X, XI, and XXV on their merits or because they present new law that does not receive retroactive application to Duest's conviction and sentence. Thus, only Duest's ineffective assistance arguments involving Claims VII, XII, and XVI remain to be considered in this final subsection.

a. Refusal of sentencing court to find mitigating circumstances (Claim VII)

Duest claims that his eighth amendment right was violated by the sentencing court's refusal to find statutory and nonstatutory mitigating circumstances which are claimed to be in the record. Duest argues that the sentencing judge failed to articulate in her sentencing order to weight given to nonstatutory mitigating circumstances. This court finds no ineffective assistance claim has been established because even if this point had been raised on direct appeal, it would not have been successful. The Florida Supreme Court has held that there is no *Hitchcock* violation (*Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)) when the sentencing court fails to articulate the weight given to non-statutory mitigating circumstances. *Harich v. State,* 542 So.2d 980, 981 (Fla. 1989). The sentencing court herein found no mitigating circumstances. This finding was supported by the record in this case.

b. Death sentence resets upon automatic aggravating circumstances (Claim XII)

Duest claims that the jury may have found him guilty under Florida's felony-murder statute (§ 782.04(1)(a)2, Fla. Stat.) which defines a capital offense as one wherein a person is killed while the defendant is perpetrating a felony. Duest then claims that one of the aggravating circumstances found by the sentencing court was § 921.141(5)(d); "the capital felony was committed while the defendant was engaged...in the commission of...robbery..." Duest then argues that if the jury found him guilty of felony murder, the application of the aggravating circumstance to the felony murder statute fails to narrow the category of those who should receive the death penalty in violation of *Zant v. Stephens,* 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). As previously noted, this court must review this issue under the claim of ineffective assistance of appellate counsel.

Appellate counsel's performance cannot be found deficient for failing to raise this issue on appeal. The evidence of premeditation in this case was overwhelming. *Duest v. State,* 462 So.2d 446, 448-49 (Fla. 1985). Furthermore, the United States Supreme Court has held that the fact than an aggravating circumstance duplicates one of the elements of the crime does not render the sentence of death unconstitutional. *Lowenfield,* 484 U.S. at 246, 108 S.Ct. at 555, 98

L.Ed.2d at 582-83.[25] The court rejects Duest's claim of ineffective assistance of appellate counsel on this claim.

c. Court's admission of evidence of other crimes and bad character evidence (Claim XVI)

Duest complains that the trial court admitted certain testimony over objection that described collateral activity of Duest consisting of "other crimes" incidents and bad character evidence. These issues were not raised on direct appeal and are not reviewed under Duest's claims of ineffective assistance of appellate counsel.

The primary testimony complained of by Duest involves an incident at a party when he used a razor blade to cut off the blouse of a 15-year old girl. Prior to the reception of this testimony by the court, counsel for Duest interposed an objection on the ground that admission of this testimony would be unduly prejudicial under § 90.403, Fla. Stat. The State argued for admission on the basis that Duest's defense was that of alibi. The witness who testified to the incident identified Duest as being at the party at the time Duest claimed to be in Massachusetts. The incident was such an unusual nature that it would be easily remembered and refute the contention that the witness was in error in identifying Duest. Duest argues that the admission of this evidence violates the rules in *Castro v. State,* 547 So.2d 111 (Fla. 1989), but this court finds to the contrary. In *Castro,* the court found that the objectionable evidence "...lacked relevance to any material fact in issue, the evidence is

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25 In *Lowenfield,* the aggravating circumstance which duplicated one of the elements of the crime was the only aggravating circumstance. The sentencing judge in this case found four aggravating circumstances. Thus, even if the jury found Duest guilty of felony-murder as opposed to premeditated murder, only one of four aggravating circumstances would have duplicated an element of the crime.

properly admissible under § 90.404(2), Fla. Stat. *See Bryan v. State,* 533 So.2d 744 (Fla. 1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

This court find that none of the claims of Duest as to ineffective assistance of appellate counsel are supported by the record in this cause.

XVI. Conclusion

For the foregoing reasons, it is hereby:

ORDERED and ADJUDGED that Duest's motion for summary judgment on the issue of procedural default, filed February 28, 1990, is GRANTED, as provided herein.

ORDERED and ADJUDGED that Duest's petition for a writ of habeas corpus, filed January 19, 1990 is DENIED.

DONE and ORDERED in Chambers at the United States District Court, Miami, this ___ day of September, 1990.

/S/
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Larry Helm Spalding, Capital Collateral Representative

Martin J. McClain, Deputy Chief Assistant CCR

Judith J. Dougherty, Assistant CCR

Celia Terenzio, Assistant Attorney General

Sylvia H. Alonso, Assistant Attorney General

DUEST v. DUGGER

Lloyd DUEST, Petitioner

v.

Richard L. DUGGER, etc., Respondent

Lloyd DUEST, Appellant

v.

STATE of Florida, Appellee.

Nos. 75039, 75254.

Supreme Court of Florida

Jan. 18, 1990

Petition was filed for writ of habeas corpus and appeal was taken from an order of the Circuit Court, Broward County, Patricia Cocalis, J., denying post-conviction relief. The Supreme Court held that: (1) defendant was not entitled to a new trial; (2) defendant was not entitled to new sentencing proceeding; and (3) appellate counsel was not ineffective.

Order denying post-conviction relief affirmed, and petition for habeas corpus denied.

Shaw, J., concurred in the result only.

Barkett, J., concurred in the result.

1. Criminal Law 998(6)

Post-conviction petitioner was not entitled to a new trial, although he contended that the State failed to disclose exculpatory evidence consisting of bus ticket showing that he traveled to the murder area 49 days after murder; there was testimonial evidence identifying petitioner as being in the area when murder occurred and whether petitioner

traveled to murder area 49 days later was thus irrelevant. West's F.S.A. R.Cr.P. Rule 3.220.

2. Criminal Law 700(2)

Tests for measuring effect of failure to disclose exculpatory evidence, regardless of whether failure constitutes a discovery violation, is whether there is a reasonable possibility that had the evidence been disclosed to the defense, result of proceeding would have been different.

3. Criminal Law 998(11)

Postconviction petitioner was not entitled to new sentencing proceeding when subsequent to imposition of death penalty his Massachusetts conviction for armed assault with intent to murder was vacated where defendant's part in robbery conviction remained undisturbed and there was thus still a basis for aggravating circumstance of prior conviction of violent felony, and there were three other valid aggravated circumstances applicable to the sentence.

4. Criminal Law 998(3)

Contention that petitioner was denied fair trial when State introduced evidence of flight and that State improperly introduced evidence of other crimes and bad character was procedurally barred in postconviction proceeding where petitioner failed to raise that issue on direct appeal.

5. Criminal Law 641.13(7)

Appellate counsel was not ineffective for failing to argue prejudicial effect of photograph of victim's dresser upon which there was a picture of persons who may have been victim's family; photograph appeared to have been relevant to case and fact that a picture of persons who may have been victim's family appeared in photograph injected

minimal victim impact evidence into trial. U.S.C.A. Const.Amend.6.

6. Criminal Law 641.13(7)

Appellate counsel was not ineffective for failing to contend that trial court erred in permitting, over objection, evidence that defendant tried to escape while he was in custody of police; evidence raised reasonably inference that defendant escaped as a result of consciousness of guilt of murder rather than other pending charges, and counsel's argument would thus have been unavailing had it raised on direct appeal. U.S.C.A.Const.Amend. 6.

Larry Helm Spalding, Capitol Collateral Representative, and Martin J. McClain, Deputy Chief Asst. CCR, and Judith J. Dougherty, Asst. CCR., Tallahassee, for petitioner/Appellant.

Robert Butterworth, Atty. Gen., and Celia A. Terenzio and Sylvia H. Alonso, Asst. Attys. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM

This is a petition for writ of habeas corpus and an appeal from the denial of a motion for postconviction relief following an evidentiary hearing. Because the death sentence was imposed in this cas, we have jurisdiction under article V, section 3(b)(1) and (9), of the Florida Constitution. In order to give adequate consideration to the issues involved, this Court temporarily stayed Duest's impending execution. We now conclude that Duest is entitled to no relief.

Duest was convicted of first-degree murder. Pursuant to the jury's recommendation, the trial judge imposed the death penalty. This Court affirmed both the conviction and

sentence. *Duest v. State,* 462 So.2d 446 (Fla. 1985). We described the circumstances of the crime as follows:

> On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy Sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Id. at 448.

Motion for Postconviction Relief

[1] Duest raises numerous claims, only two of which merit discussion. Duest first contends that he is entitled to a new trial because the state failed to disclose exculpatory evidence in violation of rule 3.220 of the Florida Rules of Criminal Procedure. In order to understand Duest's argument, it must be pointed out that Duest's defense at the trial was that of alibi. A number of relatives and friends testified that they had seen him in Wateredtown, Massachusetts, on February 15, 1982, the date on which the murder was committed. At the evidentiary hearing on the motion for postconviction relief, it was developed that among Duest's personal effects contained in the police files was a bus ticket dated April 5, 1982, reflecting travel from Boston to Fort Lauderdale. The existence of this ticket was unknown to the prosecutor and had not been disclosed to the defense as part

of discovery. Duest contended that had he known of the existence of this ticket, he could have introduced it into evidence at the trial in order to corroborate the testimony of his mother and father that they put him on the bus in Boston en route to Florida on April 5, 1982.

While it appears that the state inadvertently failed to furnish the ticket to the defense, we cannot see how this would have affected the outcome of the case. At trial, seven witnesses identified Duest as being in Fort Lauderdale, on February 15, 1982, when the murder occurred. In reaching its verdict, the jury chose to believe the state's witnesses rather than the witnesses introduced by the defense concerning Duest's whereabouts on the date of the murder. Whether or not Duest traveled from Boston to Fort Lauderdale forty-nine days later was irrelevant, and the introduction of the bus ticket would have done little to enhance the credibility of Duest's parents.

[2] Further, we reject Duest's argument predicated upon *Roman v. State,* 528 So.2d 1169 (Fla.1988), that the effect of the nondisclosure of the bus ticket must be measured by the standard of harmless error in postconviction relief proceedings. In *Roman,* this Court vacated the defendant's conviction because the state had not disclosed two pretrial statements of a state witness which were inconsistent with his testimony at the trial. This witness was essential to negating the defendant's contention that he was insane by reason of intoxication when the crime was committed. In referring to the harmless error rule in the course of rejecting the state's argument that this nondisclosure was harmless, we did not intend to create a new standard of review when discovery violations are proven in motions for postconviction relief. The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been

disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

[3] Duest further argues that he is entitled to have a new sentencing proceedings because subsequent to the imposition of the death penalty his Massachusetts conviction for armed assault with intent to murder has been vacated. He argues that because the aggravating circumstance of prior conviction of a felony involving the use or threat of violence to the person rested in part upon this conviction his death sentence should be vacated upon the authority of *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and *Burr v. State,* 550 So.2d 444 (Fla. 1989). However, we conclude that *Johnson* and *Burr* do not mandate vacation of Duest's death sentence. We believe beyond a reasonable doubt that Duest would still have receive a sentence of death without evidence of this conviction.

In *Johnson,* the Supreme Court vacated a death sentence predicated in part on the aggravating circumstance of prior conviction of a violent felony when the conviction upon which that aggravating circumstance was based was later set aside. However, in the instant case evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there is still a basis for the aggravating circumstance of prior conviction of a violent felony. *Bundy v. State,* 538 So.2d 445 (Fla. 1989); *Daugherty v. State,* 533 So.2d 287 (Fla. 1988). In *Burr* the evidence of a collateral crime later held to be inadmissible provided much of the basis for two of the three aggravating circumstances.

Finally, it should be noted that there were three other valid aggravating circumstances applicable to Duest's sentence. As we stated in our opinion on direct appeal, "even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would

still be appropriate to maintain the death penalty." *Duest v. State,* 462 So.2d at 450 (citations omitted).

We reject as without merit the following additional claims:

(1) The trial judge was in error for refusing to disqualify herself from presiding over the rule 3.850 proceeding.

(2) The judge and the jury improperly relied upon victim impact evidence.

(3) Duest was denied effective assistance of counsel by trial counsel's conflict of interest in giving advice to alibi witnesses.

(4) Trial counsel was ineffective for failing to seek to suppress statements made by Duest to law enforcement officers.

(5) The State withheld other material exculpatory evidence and introduced false and misleading evidence.

(6) Defense counsel unreasonably misinformed the jury regarding the burden of proof with respect to alibi.

(7) Duest was denied effective assistance of counsel at the sentencing phase of his trial.

[4] Duest's contention that he was denied a fair trial when the state introduced evidence of flight is procedurally barred because of the failure to raise this issue on direct appeal. The same is true with respect to the claim that the state improperly introduced evidence of other crimes and bad character.

Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Duest raises several points which he claims involve ineffective assistance of appellate counsel. We find that a number of these were not properly preserved for appeal by trial counsel. Therefore, appellate counsel cannot be deemed ineffective for failing to raise the following issues:

(1) The jury was improperly instructed on the specially heinous, atrocious, and cruel aggravating circumstance.

(2) Evidence of other crimes and bad character was improperly introduced by the state.

(3) The penalty phase jury instruction shifted the burden of Duest to prove that death was an inappropriate penalty.

(4) During the guilt phase the prosecutor improperly asserted that sympathy and mercy toward Duest were improper considerations, thus affecting the jury's considerations during the penalty phase.

(5) The jury's understanding of the importance of its role was impermissibly diminished.

(6) Nonstatutory aggravating factors were introduced into the sentencing phase.

(7) Evidence of Duest's *post-Miranda* silence was improperly introduced to show lack of remorse.

(8) Duest's death sentence was based on impermissible hearsay evidence contained in the presentence investigation report.

(9) The jury was erroneously instructed that a verdict of life must be made by a majority of the jury.

[5] We also reject Duest's claim that appellate counsel was ineffective for failing to argue the prejudicial effect of a photograph of the victim's dresser upon which there was a

picture of persons who may have been the victim's family. Trial counsel did object to the introduction of this photograph, and Duest complains that this was error under *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The photograph of the dresser appears to have been relevant to the case, and the fact that a picture of persons who may have been the victim's family appeared in the photograph injected minimal victim impact evidence into the trial.

[6] Further, Duest argues that appellate counsel was ineffective for failing to contend that the trial court erred in permitting, over objection, evidence that Duest tried to escape while he was in custody of the police. Duest was contacted by the Fort Lauderdale police on April 18, 1982, and advised that he was a suspect in the homicide. He voluntarily went to the police station for questioning. At this time, Duest was known to the police as Robert Brigida. Duest was questioned by a detective about the murder. It was then discovered that misdemeanor traffic warrants were pending in Massachusetts against Robert Brigida, and Duest was arrested on these warrants. Thereafter, when the detective momentarily left the room and returned, Duest was missing. He was found several hours later at a Fort Lauderdale apartment.

Duest appellate counsel cannot be deemed ineffective for failing to argue this point. Evidence in this case raised a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending Massachusetts charges. Consistent with the rationale of *Bundy v. State,* 471 So.2d 9 (Fla. 1985), *cert. denied,* 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), the jury could properly infer such circumstantial evidence to be evidence of guilt. The argument would have been unavailing had it been raised on direct appeal.

Duest's claim that appellate counsel was ineffective for failing to argue that testimony relating the incident concerning Duest's use of a razor should have been excluded is also without merit. In the context in which the evidence was presented, it may have been admissible. However, it is unnecessary for us to decide this question because even if it could be said that the evidence should have been excluded, the error would have been clearly harmless. Appellate counsel cannot be faulted for failing to argue a point which, even if correct, would amount to no more than harmless error.

Duest makes several other claims which are procedurally barred because they were not raised on direct appeal. These include the following:

(1) The trial court failed to find mitigating circumstances clearly contained in the record.

(2) Duest's death sentence rests upon an unconstitutional automatic aggravating circumstance.

(3) The aggravating circumstance of cold, calculated, and premeditated was unconstitutionally applied.

Finally, we note that Duest's claim for relief under *Johnson v. Mississippi* has been disposed of earlier in this opinion.

Conclusion

We affirm the order denying postconviction relief. We deny the petition for habeas corpus. We also vacate the stay of execution. No petition for rehearing shall be permitted.

It is so ordered.

EHRLICH, C.J., and OVERTON, MCDONALD, GRIMES and KOGAN, JJ., concur.

SHAW, J., concurs in result only.

BARKETT, J. concurs in result.

LLOYD DUEST, etc. Appellant,

v.

STATE OF FLORIDA, Appellee.

NO. 63,678

Supreme Court of Florida

January 10, 1985

Defendant was convicted in the Circuit Court, Broward County, Patricia W. Cocalis, J., of first-degree murder, for which the sentence of death was imposed, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) trial court did not abuse its discretion in admitting testimony of rebuttal witnesses, even though State had not disclosed them prior to trial; (2) evidence was sufficient to support conviction; and (3) evidence was sufficient to support findings on challenged aggravating circumstances.

Affirmed.

1. Criminal Law 629

If state fails to disclose identify of a witness in accordance with rules of criminal procedure, then witnesses cannot testify unless court first conducts a hearing to determined whether omission: was willful or inadvertent, was trivial or substantial, or has prejudiced defendant's abiiity to properly prepare his case. West's F.S.A. RCrP Rule 3.220(a)(1)(i).

2. Criminal Law 629

Trial court did not abuse its discretion in permitting testimony of two state rebuttal witnesses, even though State did not disclose their identity before trial, where there was full disclosure as to why witnesses were not thoroughly

identified, including their whereabouts prior to trial, the significance of testimony was explored as well as impact on defendant's ability to properly prepare for a trial, and defense counsel had opportunity to speak with both prior to their testimony and conceded at trial there was no prejudice. West's F.S.A. Const. Art. 5, § 3(b)(1).

3. Criminal Law 728(1, 5)

Proper procedure when objectionable comments are made is to object and request an instruction from the court that jury disregard the remarks.

4. Criminal Law 867

Mistrial is appropriate only when error is so prejudicial as to vitiate the entire trial.

5. Criminal Law 728(5)

Any impropriety in comments by prosecutor, allegedly insulting defense counsel so as to abrogate defendant's Sixth Amendment rights, did not so prejudice the defendant as to require a mistrial, especially where no request for corrective instruction was made. U.S.C.A. Const.Amend.6.

6. Homicide 232

Premeditation may be established by circumstantial evidence.

7. Criminal Law 552(3)

Circumstantial evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of innocence.

8. Homicide 253(3)

In prosecution for first-degree murder, testimony that defendant had stated prior to crime that he got his money by "rolling gay guys" and that he intended to do the same on the day victim was murdered, evidence that defendant was seen with victim at a "gay bar" immediately prior to murder and was seen leaving bar with victim in victim's car, and evidence that defendant was seen driving victim's car with blood stains on the sleeve of his jogging suit and with victim's stolen jewelry case was sufficient circumstantial evidence of premeditation to sustain a conviction.

9. Criminal Law 438(1),1153(1)

Introduction of photographic evidence is within the trial court's discretion, which will not be disturbed on appeal unless there is a showing of clear abuse.

10. Homicide 354

In consideration of aggravating circumstances following conviction of premeditated murder, evidence showing that victim received eleven stab wounds, some of which were inflicted in the bedroom and some in the bathroom, and medical examiner's testimony that victim lived some few minutes before death was sufficient to support finding that murder was heinous, atrocious or cruel. West's F.S.A. § 921.141(5)(h).

11. Homicide 354

In consideration of aggravating circumstances following conviction for premeditated murder, evidence that defendant informed witness that he brought homosexuals back to their apartments and beat them up, that defendant went

to his temporary residence with victim with whom defendant had been seen leaving "gay bar," that defendant went into closet where dagger was kept and left the residence with victim, that dagger was later discovered missing, that victim was later discovered at his home dead, and that victim's car and jewelry box were missing, was sufficient to support finding that the homicide was committed in a cold, calculated, and premeditated manner. West's F.S.A. § 921.141(5)(i).

R.E. Conner, Plantation, for appellant.

Jim Smith, Atty. Gen., and Marlyn J. Altman, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

This cause is before the Court on direct appeal from a circuit court judgment adjudicating Lloyd Duest guilty of first-degree murder for which the sentence of death was imposed. This Court has jurisdiction. Art.V., § 3(b)(1), Fla. Const. We affirm the conviction and sentence.

On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Defendant was tried and found guilty of first-degree murder. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence.

Defendant first argues that the trial court erred in allowing two state witnesses to testify over defense counsel's objections. Defendant claims that the state did not provide defense counsel with the names and other material information concerning two of its rebuttal witnesses until during the trial; therefore, counsel was unable to properly prepare for trial and defendant was prejudiced as a result of the non-disclosure.

[1,2] The established rule in this state is that if the state fails to disclose the identify of a witness, as mandated by Rule 3.220(a)(1)(i), Florida Rules of Criminal Procedure, then the witness cannot testify unless the court first conducts a hearing to determine whether the omission was willful or inadvertent, whether the omission was trivial or substantial, and whether the omission has prejudiced the defendant's ability to properly prepare his case. *Richardson v. State,* 246 So.2d 771, 775 (Fla. 1971). *See also Haversham v. State,* 427 So.2d 400 (Fla. 4th DCA 1983). In the instant case, there was full disclosure as to why both state rebuttal witnesses were not thoroughly identified, including their whereabouts prior to trial. The significance of their testimony was explored as well as the impact on the defendant's ability to properly prepare for trial. Defense counsel had the opportunity to speak with both witnesses prior to their testimony and conceded at trial that there was no prejudice to the defendant other than the simple fact that the witnesses had not been fully disclosed prior to trial.

Based on the facts contained in the record, we find that the trial judge fully complied with the mandate of *Richardson.* There was no abuse of discretion in the decision of the trial judge to permit the two state rebuttal witnesses to testify.

Defendant next argues that his sixth amendment rights were abrogated when the prosecutor insulted defense counsel during cross-examination of a state witness.

Defendant contends that such comments warranted the granting of his motion for mistrial.

[3-5] The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks. *Ferguson v. State,* 417 So.2d 639 (Fla. 1982). No request was made in this case. Moreover, a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. *Cobb v. State,* 376 So.2d 230 (Fla. 1979). We believe that the comments of the prosecutor did not so prejudice the defendant. Thus, we find that the trial judge did not abuse his discretion in denying defendant's motion for mistrial.

[6-8] Defendant further contends that there was insufficient evidence of premeditated murder to convict him as charged in the indictment. Premeditation, like other factual circumstances, may be established by circumstantial evidence. *Adams v. State,* 412 So.2d 850 (Fla.), *cert. denied,* 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence. *Peek v. State,* 395 So.2d 492 (Fla. 1980), *cert. denied,* 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). The record reflects that defendant had stated he gets his money by "rolling gay guys" and that he intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driving the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car which was being driven by defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a seven-inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient

circumstantial evidence to sustain defendant's conviction of premeditated murder.

[9] Defendant also argues that the trial court erred in allowing the introduction of a prejudicial photograph which was irrelevant to any essential issue in the case. The law is well established that admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. *Wilson v. State,* 436 So.2d 908 (Fla. 1983). No such showing has been made in this case. The photograph was relevant and any improper prejudicial impact did not outweigh its probative value. *See Adams v. State,* 412 So.2d 850 (Fla. 1982), *cert. denied,* 459 U.S. 882,103 S.Ct., 74 L.Ed.2d 148 (1982).

Finally, defendant objects to the trial court's findings with respect to the aggravating and mitigating circumstances. The trial court found the following aggravating circumstances: 1) The defendant had been previously convicted of armed robbery and assault with intent to commit murder, section 921.141(5)(b);2) the capital felony was committed while the defendant was engaged in the commission of a robbery, section 921.141(5)(d); 3) the capital felony was committed for pecuniary gain, section 921.141(5)(f);4) the capital felony was especially heinous, atrocious, or cruel, section 921.141(5)(h); 5) the capital felony was a homicide which was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). The trial court considered circumstances 2 and 3 as one circumstance because of overlapping facts and legal definitions. Therefore, four aggravating circumstances were applicable. As to mitigating circumstances, none were applied to this case.

[10] Defendant only challenges two of the aggravating circumstances. He asserts that the murder was not particularly heinous, atrocious or cruel. We disagree with the defendant. The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

This case is similar to *Morgan v. State,* 415 So.2d 6 (Fla. 1982), where the evidence showed that the death was caused by one or more of ten stab wounds. In this case, this Court approved the finding that the homicide was especially heinous, atrocious, or cruel. Under the totality of the circumstances and applying our previous decisions to the facts of the instant case, we find that the trial court properly applied this aggravating circumstance.

[11] Defendant also challenges the finding that the homicide was committed in a cold, calculated, and premeditated manner. In finding that this aggravating circumstance applied, the trial court found:

> Evidence adduced at trial indicated that defendant informed witness Demezio some two days prior to the murder that be brings homosexuals back to their apartments, beats them up, and takes their money or jewelry. Defendant on the day of the murder went to his temporary residence with the victim, went into the closet where Domezio kept a dagger and left the residence with John Pope, Jr., the victim. The dagger was later discovered missing, and John Pope, Jr., was later discovered at his home, dead. His car and jewelry box were missing.

We find that the evidence supports the finding that the homicide was committed in a cold, calculated, and premeditated manner.

In the instant case, even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty; *Fleming v. State,* 374 So.2d 954 (Fla. 1979); *Hargrave v. State,* 366 So.2d 1 (Fla. 1978), *cert. denied,* 444 U.S. 919, 100 S.Ct. 493, 62 L.Ed.2d 414 (1979).

For the reasons expressed, we affirm the defendant's conviction and the imposition of the death sentence.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, J.J., concur.

(2)

DOCKET NO. 93-1051

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HARRY K. SINGLETARY, JR.,

Petitioner,

vs.

LLOYD DUEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DOCKET NO. 93-1163

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QUESTION PRESENTED

[WHETHER] A PANEL DECISION OF THE ELEVENTH CIRCUIT OF APPEALS WHICH FOUND HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON V. MISSISSIPPI, 486 U.S. 578 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENT IN BRECHT V. ABRAHAMSON, 507 U.S. ___, 113 S. CT. 1710, 123 L.FD.2D 353 (1993).

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ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Lloyd Duest, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Eleventh Circuit Court of Appeals in this case. That opinion is reported at 997 F.2d 1336 (11th Cir. 1993).

OPINIONS BELOW

In Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), the Eleventh Circuit issued an opinion ordering sentencing relief on the basis of the violation of Johnson v. Mississippi, 486 U.S. 578 (1988), which occurred in Mr. Duest's case. The Florida

Supreme Court had found a violation of Johnson occurred in Mr. Duest's penalty phase proceedings. Duest v. Dugger, 555 So. 2d 849 (Fla. 1990). Before the Eleventh Circuit, the State had conceded that Johnson error occurred. Duest v. Singletary, 967 F.2d at 480. The Eleventh Circuit found the Johnson error warranted habeas relief. This Court vacated the decision of the Eleventh Circuit and remanded for reconsideration in light of Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). Singletary v. Duest, 113 S. Ct. 1940 (1993). On remand, the Eleventh Circuit after considering Brecht again ordered habeas relief. Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its petition, the State of Florida recited the Eighth, Tenth and Fourteenth Amendments as the constitutional provisions involved. Mr. Duest agrees that the Eighth and Fourteenth Amendments are involved.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This is a habeas corpus action initiated by a Florida death-sentenced inmate. The state courts found and the State conceded Eighth Amendment error at Mr. Duest's penalty phase proceeding before his jury when the State introduced a prior conviction for aggravated assault with intent to murder.[1] After asking that the

[1]In its petition for a writ of certiorari, the State of Florida has taken a position at odds with its concession below. (continued...)

prior conviction be read a second time, the jury recommended death by a vote of seven to five.[2] Subsequently, that prior conviction was vacated and nolle prossed because it was determined that under the applicable law Mr. Duest had not committed the crime of aggravated assault with intent to murder. At Mr. Duest's penalty phase proceeding, the only evidence presented to support this prior conviction was the fact of conviction. Before the Eleventh Circuit the State of Florida agreed that Johnson error had occurred.

Mr. Duest's jury was instructed to weigh the aggravating and mitigating evidence in deciding what sentence to recommend: "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence" (R. 1799).[3] After being so instructed, the jury asked to see Mr. Duest's prior convictions. Thereupon, the

---

[1](...continued)
Compare ("In all material respects, no Johnson violation occurred because the aggravating factor, § 921.141(5)(b), Fla. Stat., was proven beyond a doubt, a prior violent felony was proven to the jury") Petition at 11; with ("Duest cannot establish that a defect in some of the evidence presented to support a factor that remained valid absent the defect, coupled with three other aggravating factors, had an injurious effect in his sentencing determination.") Supplemental Brief of Harry Singletary dated June 18, 1993.

[2]Under Florida law, had one juror voting for death switched and voted for life, a life recommendation would have resulted. Cooper v. State, 581 So. 2d 49 (Fla. 1991).

[3]The State in its petition before this Court completely ignores the fact that the jury was instructed to "weigh the aggravating and mitigating evidence" (emphasis added).

judge read to the jury the judgments reflecting that Mr. Duest had committed an aggravated assault with intent to murder two individuals. Only after again hearing this materially erroneous evidence a second time did the jury return a seven to five death recommendation.

The State erroneously sets forth in its petition: "the trial court found no mitigating evidence applied to the case." Petition at 4.[4] In the findings of fact issued by the sentencing judge at the time the sentence of death was imposed, the judge did not find any statutory mitigating factors applied (R. 1835). However, the order did not address non-statutory mitigation (R. 1835-36). Instead, the judge stated: "this Court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating [circumstances]" (R. 1836).[5]

In post-conviction proceedings, Mr. Duest raised a claim concerning whether the sentencing judge considered the non-statutory mitigating which had been presented by Mr. Duest at trial. The State and the sentencing court responded that "plenty" of mitigation had been presented to the jury and

---

[4]Of course under Florida law, the question of prejudice focuses not upon what the judge found, but rather upon "whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989).

[5]This language should be compared to the language of the sentencing order at issue in Parker v. Dugger, 111 S. Ct. 731, 736 (1991)("There are no mitigating circumstances that outweigh the aggravating circumstances").

considered by the judge at Mr. Duest's sentencing (PC R. 121). In the state post-conviction proceedings, the sentencing judge stated:

> THE COURT: The court was aware of the fact there was drug abuse.
>
> * * *
>
> THE COURT: I was aware of that, where the family testified during the trial.
>
> MR. McCLAIN: That was nonstatutory mitigation, that was before the jury as well, because the jury heard the testimony about the drug abuse, and I believe the father testified about taking him to Methadone treatment and so forth.
>
> THE COURT: Yes, he did.
>
> * * *
>
> THE COURT: There were also factors where the mother was saying how physically ill he was as a baby and whatever else. I mean I heard all of that. I think I have to say I considered it, but I will go through all the cases again. And I remember that, because I didn't see it anywhere, but I remembered that the family testified to, beyond the presentence investigation relayed because they were there at the sentencing phase as well, and did testify at that time.
>
> So, we are talking about physical and mental and stress, and drug abuse, and prison time.

(PC R. 119-22)(emphasis added).

In its post-conviction answer brief to the Florida Supreme Court, the State conceded that "evidence of [Mr. Duest's] prior drug history, therapeutic interventions and status as a good father, husband, son and brother" were presented to the jury (Answer Brief from Denial of a Motion for Post Conviction Relief at 37). Both statutory and nonstatutory mitigating circumstances were in fact set forth in the record. In the penalty phase

proceeding, the State conceded that Mr. Duest had a history of debilitating drug abuse (R. 1607). The State conceded that he had helped an inmate:

> What has he done? Well, he has done a couple of things. I stand corrected. The parents, Mr. Duest mentioned to you that he helped an inmate once. Consider that. Consider anything else that was brought out along that line.

(R. 1615). The prosecutor was referring to an incident in Walpole prison where Mr. Duest assisted a guard who was giving aid to an inmate who had been stabbed:

> I don't have much more to say except he has helped people in prison when he was there. He helped a guard with a prisoner that had been stabbed. He went out and him and another person took him to the hospital. The guard couldn't go into the section. He was serving time at that time. He just waited there at the hospital and he didn't escape or anything. He waited for the prisoner to go back with the guard back to prison.

(R. 1578-79). In regard to Lloyd's serious drug abuse history, his father testified:

> A I brought him to a drug clinic. I believe it was in Cambridge, Cambridge, Mass. He had another drug problem a little later and brought him - trying to bring him to another one. He couldn't get into one because they were all filled. He has got a young daughter.

(R. 1578). The State also conceded that there was testimony that Mr. Duest was a good father (R. 1615-16). The State conceded that these were mitigating factors.

The State conceded that there was evidence upon which the sentencer could find the influence of extreme mental or emotional disturbance in that Mr. Duest had a long-standing drug problem (R. 1607). There was also additional evidence in the record

which would have supported the impairment factor as well as extreme disturbance in that Mr. Duest detailed a lengthy psychiatric history:

> MR. BARON: There were two other things he brought to my attention.
>
> One was concerning any psychological history. He indicated to me that he told Miss Balazik that while in Walpole and in -- what was the other prison?
>
> THE DEFENDANT: Concord. I transferred from Walpole to Concord.
>
> MR. BARON: -- he had seen a psychiatrist and been in some kind of therapy. One of them is mentioned in the PSI, I believe the Walpole one, but the Concord one is not mentioned, neither one. My understanding, none of the doctors, from what I'm told, still work within the prison or prison system, so whether or not they would have added anything is unknown at this time.
>
> THE COURT: So there is an omission of one, the Concord one. You have the Waltham one in here, right?
>
> MS. BALAZIK: Yes.
>
> MR. BARON: And the one he's been seeing within the Broward County jail is listed in there.
>
> THE DEFENDANT: I saw a psychiatrist of two years, once a week, one on one, from 1971 to 1973, and I guess three years later I was arrested for illegal possession of a firearm. My parole was violated on account of the arrest.
>
> I was sent to Walpole, did 14 months, went to trial and was found not guilty, and during that 14-month span of time, I also saw a psychiatrist.
>
> MR. BARON: In addition, he indicated that he gave Miss Balazik a number of additional places that he had worked for whatever period of time that are not included within the PSI. I don't know if it was because they were not confirmed or what the situation was.

(R. 1662-63).

Numerous additional nonstatutory mitigating evidence was present in the record. Mr. Duest's father testified that his son Lloyd had been an excellent son, and that Lloyd got diplomas while in prison for counseling younger drug addicts (R. 1577). His sister testified that he had been a good brother (R. 1582). His mother said her son, Lloyd, was lovable and compassionate, that he was a quiet boy and never a discipline problem at school (R. 1583-84). His wife testified that he had been a good husband and father (R. 1587). Mr. Duest worked on his parent's home, always gave Christmas gifts except for the time when he was on escape status, and loved his family (R. 1671). During his time in the Broward County Jail, Mr. Duest made a significant contribution to group therapy sessions:

> Mental: Records from Walpole State Prison indicate that the subject was seen in 1971 by a prison psychologist on a one to one basis. However, no clinical diagnosis was ever made. The subject is currently in group therapy sessions in Broward County Jail. According to Psychotherapist Gary B. Lane, Lloyd contributed to the group by assisting other inmates in problem solving, bringing numerous newspapers and magazine articles to be shared by the group and actively participating verbally in group interactions. He states that his participation acted as a role model for others to do the same. As a group therapy member, Mr. Duest made a significant contribution to the effectiveness of the sessions.

(R. 1811). Mr. Duest was not known for violence and to the contrary had a reputation for respect of his family and friends, and helping others:

> Friend, Edward R. Lavache, states, "I am a Watertown firefighter and have been a friend of Lloyd Duest for over ten years During this time I have never known Lloyd to do harm to anyone. I do not believe he would ever take the life of another person. I have always

known him to be a loving father and husband, he has always shown the greatest respect for his family and friends. He has always helped me whenever possible and I've never seen him turn down a friend."

(R. 1813). Mr. Duest was characterized as a good worker:

Friend, James Pallone, states, "I would like to write this Recommendation for Lloyd Duest who I have known all my life. He has always been in good standing and shown Character with my family and his community within the last 25 years.

He has worked for my [sic] for 10 years and was prompt at his job. He showed responsibility and character in his job, and always got along with his fellow workers.

If there is anything I could do or testify to in his behalf please do not hesitate to contact me."

(R. 1813). In fact, the probation officer, who authored a presentence investigation that the judge considered, concluded that Mr. Duest did satisfy mitigating factor (8) in that "he does has [sic] a very supportive family, friends and members of the community in Massachusetts" (R. 1816).

The State conceded in state court that "plenty" of mitigating evidence was presented to the jury (PC-R. 121). It was this mitigating evidence that the jury was told to weigh against the aggravating evidence. The jury was only able to reach a verdict after hearing materially inaccurate aggravating evidence a second time.

Under Florida law, a jury's recommendation of life is binding if there exists a reasonable basis for the recommendation in the record. Hall v. State, 541 So. 2d 1125 (Fla. 1989). A "Florida penalty phase jury is a co-sentencer under Florida law." Johnson v. Singletary, 612 So. 2d 576 (Fla. 1993). As a result,

the Eleventh Circuit concluded that if one juror voting for death had instead voted for a life, a different sentence would have resulted. This is because the wealth of mitigating evidence contained in the record would have provided a life recommendation with a reasonable basis. The Eleventh Circuit then concluded that the circumstances here demonstrated that the Johnson error had a substantial influence:[6]

> Several facts persuade us that such a likelihood exists. Most important, Duest's sentencing jury was permitted to consider evidence that was materially inaccurate; the jury did not merely consider properly-admitted evidence in an improper way. That un-constitutional evidence -- a subsequently over-turned conviction for armed assault with intent to murder -- helped portray Duest to the jury not only as an individual with a propensity for criminal violence, but as a recidivous killer. As we previously wrote: "The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death." *Duest v. Singletary*, 967 F.2d 472, 482 (11th Cir. 1992), *vacated on other grounds*, 507 U.S. ___, 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993). Furthermore, the jury requested to see the vacated convictions

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[6]The Eleventh Circuit did not address Mr. Duest's other challenges to his death sentence because of its decision to grant relief for the Johnson error. In the unlikely event that this Court were to grant certiorari review and reverse, consideration of the these remaining issues would be required. These issues include Mr. Duest's claim that his jury received instructions in violation of Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Duest's jury received the same instruction at issue in Espinosa. The state courts applied a procedural bar which the District Court ruled was inadequate. An analysis of the harmlessness of the Johnson error should include consideration of the other Eighth Amendment errors which infected the process. If certiorari review is granted, Mr. Duest argues that consideration of other Eighth Amendment error must be included in the harmless error analysis.

> after having deliberated for some time. This fact "suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence." Id. Although it is unclear how much time elapsed between the jury's request and its arrival at a recommendation of death, the fact that the sentencing hearing took only one day, when combined with the circumstances surrounding the jury's decision, further calls into question the reliability of the jury's recommendation. Id. We recognize that the State established three valid aggravating circumstances. Nevertheless, especially when viewed in the light of the close jury vote and the mitigating circumstances, we believe the facts discussed indicate that at least one juror who recommended the death penalty likely was substantially influenced by the vacated conviction.

Duest v. Singletary, 997 F.2d at 1339-40.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT THOROUGHLY ANALYZED THE RECORD, FLORIDA LAW, THE JURY INSTRUCTIONS, AND THE JURY'S REQUEST TO SEE THE VACATED CONVICTION DURING ITS DELIBERATION. THE ELEVENTH CIRCUIT'S CONCLUSION THAT HABEAS RELIEF SHOULD ISSUE RESULTED BECAUSE THE EIGHTH AMENDMENT ERROR WAS IN FACT HARMFUL.

The issue presented here is simply not worthy of certiorari review. The Eleventh Circuit engaged in a rather routine Brecht analysis.

Regarding trial errors, Brecht held that in habeas corpus proceedings, "the standard for determining whether habeas relief must be granted is whether the [constitutional] error 'had substantial and injurious effect or influence in determining the

jury's verdict.'"[7] 113 S. Ct. at 1714, quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).

As Kotteakos explained:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-65 (footnote omitted). The question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong . . . in the total setting." Id., quoting Kotteakos, 328 U.S. at 764. See also Brecht, 113 S. Ct. at 1724 (Stevens, J., concurring).[8]

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[7]Mr. Duest does not concede that the error herein was merely trial error. The Florida Supreme Court found Eighth Amendment error, but then applied an automatic affirmance rule ("even if we were to find that one or two aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty." Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990), quoting Duest v. State, 462 So. 2d 446, 450 (Fla. 1985). This was structural error in the state court process. See Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993).

[8]Moreover, under Brecht, the beneficiary of the error bears the burden of establishing harmlessness. Although the Eleventh Circuit did not place this burden upon the State of Florida, it should have. Justice Stevens emphasized that the Kotteakos standard "places the burden on prosecutors to explain why those errors were harmless" and observed, "Kotteakos plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution." 113 S. Ct. at 1723 (Stevens, J., concurring). The Fifth Circuit has held that Brecht requires the (continued...)

Additionally, under Brecht, the habeas court must conduct a de novo review of the entire record in assessing whether or not the error was harmless. Lowery, 996 F.2d at 773. The Kotteakos standard requires a reviewing court to "make a de novo examination of the trial record" in order to "consider all the ways that error can infect the course of a trial." 113 S. Ct. at 1724 (Stevens, J., concurring).

The Eleventh Circuit conducted a de novo review of the entire record and concluded that given Florida law, substantial influence existed:

> Several facts persuade us that such a likelihood exists. Most important, Duest's sentencing jury was permitted to consider evidence that was materially inaccurate; the jury did not merely consider properly-admitted evidence in an improper way. That un-constitutional evidence -- a subsequently over-turned conviction for armed assault with intent to murder -- helped portray Duest to the jury not only as an individual with a propensity for criminal violence, but as a recidivous killer. As we previously wrote: "The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death." *Duest v. Singletary*, 967 F.2d 472, 482 (11th Cir. 1992), *vacated on other grounds*, 507 U.S. ___, 113 S.Ct. 1940, 123 L.Ed.2d 647 (1993). Furthermore, the jury requested to see the vacated convictions after having deliberated for some time. This fact "suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence." Id. Although it

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[8](...continued)
prosecution to establish harmlessness. Lowery v. Collins, 996 F.2d 770, 773 (5th Cir. 1993).

> is unclear how much time elapsed between the jury's request and its arrival at a recommendation of death, the fact that the sentencing hearing took only one day, when combined with the circumstances surrounding the jury's decision, further calls into question the reliability of the jury's recommendation. Id. We recognize that the State established three valid aggravating circumstances. Nevertheless, especially when viewed in the light of the close jury vote and the mitigating circumstances, we believe the facts discussed indicate that at least one juror who recommended the death penalty likely was substantially influenced by the vacated conviction.

Duest v. Singletary, 997 F.2d at 1339-40.

The State cannot establish that the errors had no "substantial and injurious effect or influence" on the jury's verdict. The jury was told: "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence" (R. 1799). Thereafter, while deliberating, the jury requested to hear for a second time the prior convictions read to it. Only then was a seven to five death recommendation returned.

Additionally, because Florida sentencers weigh aggravating evidence against mitigating evidence, the existence of mitigating evidence in the record also shows that the State cannot establish that the erroneous instructions were harmless. Mitigating evidence establishing a reasonable basis for a life recommendation was in the record. The extra aggravating evidence on death's side of the scale thus could not but have had "substantial and injurious effect or influence" on the jury's

balancing of aggravating evidence and mitigating evidence. See Stringer v. Black, 112 S. Ct. 1130 (1992). Moreover, if the jury had recommended life, the mitigating evidence in the record would have precluded an override. Hall v. State, 541 So. 2d 1125 (Fla. 1989). The Eleventh Circuit's conclusion was properly premised upon a review of the entire record and Florida law.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 25, 1994.

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